Mr. Austin died of natural causes, apparently in late 1994. (Ex. 261). Mr. Austin's death triggered a renewed schizophrenic episode, in that Ms. Lowe suffered the delusion that Mr. Austin was still alive, and she continued to live with his decomposing body until January 4, 1995, when she was found by the Chicago police, while walking naked outdoors. (C 29; EX 95-96.) She was again hospitalized, but later released to an outpatient treatment program. (EX 95-96, 130.)

Ms. Lowe was again hospitalized for about two weeks in July 1995. (EX 103.) According to Ms. Lowe's medical records, she was delusional, her speech was incoherent, and her thinking was disorganized. (EX 113.) On August 26, 1995, she was re-hospitalized. (EX 101.) On this occasion, Ms. Lowe was transferred to the Tinley Park Mental Health Center ("TPMHC"), a state mental hospital, where she remained until December 16, 1996. (SR II 26; EX 96, 278-280.) She suffered from hallucinations and delusional thinking, but eventually responded to treatment in October 1996, when she was given a new antipsychotic drug. (EX 96.) The TPMHC staff noted Ms. Lowe's need for a guardian, due to the likelihood that she would not be able to care for herself upon discharge. (EX 300, 317, 378, 395, 454, 460.)

Ms. Lowe's mental illness was well-known in her neighborhood. (SR II 60-61, 83.) Jewel Hightower, a letter carrier whose route included Ms. Lowe's home from 1991 forward, was aware of Ms. Lowe's mental illness, as were Ms. Lowe's neighbors. (SR II 54-58, 60-61, 82-83, 85-87.) According to Ms. Hightower, Ms. Lowe exhibited a variety of strange behaviors, including coming outside undressed, shouting names and obscenities, moving her furniture to the curb, and screaming at passersby. (SR II 56-57, 60-61.)

Such episodes frequently were followed by hospitalizations. (SR II 58.)

Ms. Hightower would hold Ms. Lowe's mail during her hospitalizations. (SR II 58-59, 62, 82.) Until Ms. Lowe's last hospitalization in August 1995, she would call the post office when she returned home, and Ms. Hightower would then deliver Ms. Lowe's mail. (SR II 58-59.)

Apex's Tax Deed Petition and Failed Attempts at Providing Notice

On March 3, 1993, Apex purchased Ms. Lowe's home for $347.61, and received a "certificate of purchase," at a tax sale authorized by Articles 22 and 23 of the Illinois Property Tax Code, 35 Ill. Comp. Stat. 200/21-190 *et seq.* and 22-5 *et seq.* (the "Code"). (C 2, 4.)[3]

On October 5, 1995, Apex filed a petition in the Circuit Court of Cook County seeking a tax deed to the property (the "tax deed petition"). (C 2-4.) Under the Code, Ms. Lowe was entitled to redeem the property by paying the unpaid taxes, plus certain expenses, before the redemption period expired on February 21, 1996. *See* 35 Ill. Comp. Stat. 200/21-345 through 21-355.

Apex was required to comply with certain statutory notice provisions, including the publication of notice in a newspaper published within Cook County and service of notice by the Cook County Sheriff. *See* 35 Ill. Comp. Stat. 200/22-10 through 22-25. If the Sheriff could not effect personal service, Apex was required to undertake a "diligent inquiry" to locate and serve the owner with notice. *See* 35 Ill. Comp. Stat. 200/22-15.

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[3] This amount included the amount of delinquent 1991 property taxes ($110.65), interest, and statutory fees. (C 4.)

On October 26, 1995, the Sheriff attempted to serve Ms. Lowe, Mr. Austin, and the "occupant" of the property. (C 11-13.) The Sheriff reported that he had been unable to serve anyone at the property, which he reported to be "vacant per neighbors." (*Id.*) He then sent notices by certified mail addressed to the property to Ms. Lowe, Mr. Austin, and "occupant." (C 54-55.)

Ms. Hightower, the letter carrier, later testified that she became concerned when she received the Sheriff's letters because she recognized their potential importance. (SR II 64-65, 79-80.) Ms. Hightower had learned that Ms. Lowe was hospitalized at TPMHC, but she did not know when Ms. Lowe would be released. (SR II 65, 75-76, 82.)[4] Ms. Hightower duly recorded the fact of Ms. Lowe's hospitalization at the branch post office. (SR II 72, 82-84.)

Ms. Hightower marked the envelopes addressed to Ms. Lowe and "occupant" with her initials (JHT), her postal route number (2719) and the annotation "Person is Hospitalized." (C 54; SR II 66-70, 79.) Ms. Hightower also knew that Mr. Austin had died and therefore wrote "deceased" on the letter addressed to him. She then returned the letters to the Sheriff. (C 15, 54; SR II 65-66.) The Sheriff filed the letter addressed to Mr. Austin with the court on November 22, 1995; he later filed the letters addressed to Ms. Lowe and "occupant" on January 2, 1996. (*Id.*)

Apex's agent Fred Berke visited the property between September 21 and November 21, 1995. (Pet. App. at 83a.) No one answered when Mr. Berke knocked on the door. (*Id.* at 93a.) Mr. Berke looked in a window and noticed that the living room had no furniture. (*Id.*) Mr. Berke later testified

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[4] The United States Postal Service also maintained records requiring Ms. Lowe's mail to be held for this reason. (SR II 72, 82-84.)

that he then spoke with Ms. Lowe's next-door neighbor, who said that Ms. Lowe owned the property, but that no one was currently living there. (*Id.* at 94a.) Mr. Berke did not say whether he asked the neighbor where Ms. Lowe was or how she could be reached.

By reviewing a "print out tract search," a deed, and public records, Apex determined that the Starks & Boyd, P.C. law firm had represented Ms. Lowe in connection with the 1993 quitclaim deed, and that First National Bank of Chicago had been a mortgagee. (*Id.* at 94a-95a.) The Sheriff effected service on both parties between October 24 and 26, 1995. (*Id.* at 95a.) Apex determined that Ms. Lowe was registered to vote at her home. (*Id.*) Apex caused the Clerk of the Circuit Court to send notices to Ms. Lowe, Mr. Austin, "occupant," Starks & Boyd, P.C., and First National Bank of Chicago by certified mail on November 8, 2005. (*Id.* at 95a-97a; C 6-10) The first three notices were returned by the Postal Service. (C 16, 547.)

Apex also gave notice by publication in *The Chicago Daily Law Bulletin* on October 11, 12, and 13, 1995. (*Id.* at 96a.) Apex never served Ms. Lowe, who remained hospitalized in at TPMHC, a state mental hospital.

The Tax Deed Hearing

On March 6, 1996, Apex filed an Application for an Order Directing the County Clerk to Issue a Tax Deed. (C 18.) On March 18, 1996, the presiding judge, Hon. Marjan Staniec, held an *ex parte* hearing with respect to that application. (Pet. App. at 91a-98a.)

The transcript of the *ex parte* proceeding consists of 9 pages, including the title page. (*Id.* at 91a-98a.) Apex's attorney, Jonathan Smith, called Mr. Berke as his only witness, and Mr. Berke's testimony consists of 34 lines. (*Id.*

at 93a-94a.) Mr. Berke testified that he visited the property and spoke to Ms. Lowe's next-door neighbor, who said that Ms. Lowe was the owner of the property, but that no one was currently living there. (*Id.*) Mr. Berke apparently did not ask the neighbor where Ms. Lowe was, or how she could be reached, and he did not disclose the purpose of his visit. (*Id.*) He did not ask whether anyone else might know about Ms. Lowe's whereabouts or how to contact her. Nor did he inquire about Ms. Lowe's reputation in the neighborhood.

Following Mr. Berke's testimony, Mr. Smith, Apex's lawyer, summarized Apex's attempts at notice. (*Id.* at 94a-97a.) He noted that the Sheriff failed to obtain personal service on Ms. Lowe and Mr. Austin, and that the Sheriff had sent them certified letters. (*Id.* at 95a-96a.) Mr. Smith offered the returned envelopes in evidence, but made no mention of the notations that Ms. Lowe was hospitalized and Mr. Austin was dead. (*Id.*) Mr. Smith further asserted that no incompetents appeared to have an interest in the property. (*Id.* at 97a.) Judge Staniec admitted the envelopes in evidence, but did not inquire about the notations. (*Id.* at 96a.)[5]

Judge Staniec asked one substantive question of Mr. Smith: "[W]hat were the diligent efforts you made to try to locate the whereabouts of Mary Lowe and William Austin, Sr.?" (*Id.* at 96a.) Mr. Smith responded:

> We checked all the city and suburban phone directories and were unable to find any listing or address for Mary Lowe or William Austin. All of our regular efforts proved fruitless and that's why we sent the notice to who we assume to be their attorneys,

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[5] Judge Staniec, following his retirement from the bench, gave an affidavit stating that he would not have granted Apex's application if Ms. Hightower's notations had been called to his attention. (C 541-42.)

> Starks and Boyd. We also placed a call to Starks & Boyd, and they would not give us an address, and indicated we should send the notice to them.

(*Id.*)

Judge Staniec concluded that Ms. Lowe's redemption period had expired, that no redemption had occurred, and that Apex had exercised due diligence in ascertaining the identify of interested parties and their whereabouts. (*Id.* at 97a-98a.) Judge Staniec continued the matter to allow Apex to provide a transcript of the proceedings, submit proof of payment with respect to post-1991 property taxes, and draft an appropriate order. (*Id.*)

On May 20, 1996, Judge Staniec entered a written order, finding, "upon proofs and exhibits heard and offered in open court," that Apex had "fully complied with all of the Statutes and the Constitution of the State of Illinois relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto," and directing that a deed be issued vesting Apex with fee-simple title to the property. (Pet. App. 88a-90a.) On the same day, the Clerk issued the deed, which was recorded on June 5, 1996. (EX 68-71.)

Proceedings to Set Aside the Tax Deed

On September 5, 1997, Mario and Bruce Lowe, Ms. Lowe's sons, filed a pro se petition asking that the Circuit Court set aside the tax deed, based on Ms. Lowe's hospitalization at TPMHC. (C 23-24.) Judge Staniec then appointed the Cook County Public Guardian as Ms. Lowe's attorney and guardian ad litem. (C 541-44.)

On November 10, 1997, the Public Guardian filed a Petition to Set Aside Tax Deed and Stay Order of Possession under Section 2-1401 of the Illinois Code of Civil Procedure and Section 22-45 of the Property Tax Code. (C 29-32.) On

April 17, 1998, the Public Guardian filed an Amended Petition. (C 46-52.) The Public Guardian asserted that Apex had notice of Ms. Lowe's hospitalization by virtue of Ms. Hightower's notations on the returned letters. The Public Guardian further argued that, in light of Apex's knowledge that Ms. Lowe was hospitalized, and its failure to make any further inquiry of Ms. Hightower or the Postal Service, Apex had failed to undertake the diligent inquiry required by the Fourteenth Amendment and this Court's holding in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). (C 46-51.)

On December 6, 1996, Apex had entered into an installment sale contract with John Herndon, who agreed to pay Apex $10,000 for Ms. Lowe's home. (C 85-92.) On August 12, 1998, John Herndon moved to dismiss the Public Guardian's petition. (*Id.*) On April 14, 1999, the Public Guardian moved for partial summary judgment, seeking a determination that Mr. Herndon was not a bona fide purchaser because his contract remained executory and he had actual notice of Ms. Lowe's claim to the property. (C 161-65.)

Judge Staniec granted the Public Guardian's motion after hearing arguments on behalf of all parties. (R 53-94). In his Memorandum Decision, Judge Staniec concluded that Apex had actual or constructive knowledge, at the time of the March 18, 1996 *ex parte* hearing, that Ms. Lowe was hospitalized and had not received notice. (Pet. App. 82a-87a.) According to Judge Staniec, that knowledge was to be imputed to Mr. Herndon as well. (*Id.* at 86a.) With respect to Apex, Judge Staniec concluded:

> Apex "knew" or "should have known" that respondent was in the hospital. It had either actual or constructive notice of the circumstances. Actual if it

> had exercised due diligence in reviewing the court file before the [March 18, 1996] prove-up, or constructive notice if it failed to exercise due diligence. Apex should or would have noted the Post Office notation on the return envelope -- and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by the Property Tax Code.

(*Id.* at 84a-85a.)

On September 17, 1999, following Judge Staniec's retirement, the Public Guardian moved for summary judgment on its Amended Petition. (C 370-76.) On February 16, 2000, Judge Nancy Arnold denied the motion and set the matter for trial. (Pet. App. 81a.) The case was tried by Judge Edward O'Brien on February 20, 2002. Only the Public Guardian presented evidence.

Dr. Bernard Rubin, an expert in the field of psychiatry, who had examined Ms. Lowe's health records, testified that Ms. Lowe suffered from chronic disorganized schizophrenic disorder, the most severe form of schizophrenia. (SR II, 18, 21-26, 31, 49, 104-105; EX 97-126.) During the period between January 1995 and October 1996, Ms. Lowe "suffered from an insane delusion which prevented her from being fit to handle any social or businesses necessities that arose in her life." (EX 96.) "Even if she had been served," according to Dr. Rubin, she would have been "unfit for any appropriate or realistic response." (*Id.*)

The Public Guardian also called Jewel Hightower, the letter carrier. She testified about Ms. Lowe's mental illness, and described Ms. Lowe's bizarre behaviors, based on personal observations and on conversations with neighbors. (SR II 56-58, 60-61, 82-83, 86-87.)

Ms. Hightower also testified as to how she had marked the letters addressed to Ms. Lowe, Mr. Austin, and "occupant," which Apex later filed with the Circuit Court. (SR II 64-71.) Ms. Hightower further testified that no one ever contacted her or anyone else at the post office concerning the letters. (SR II 74-79.) If someone had asked her, she would have reported that Ms. Lowe was hospitalized at TPMHC, a state mental hospital. (SR II 74-76.) In addition, the same information was available to anyone filling out the proper forms at the branch post office. (SR II 80-81, 84.)

On April 9, 2002, Judge O'Brien denied the Amended Petition. (Pet. App. 63a; 64a-80a.) Judge O'Brien concluded that Ms. Lowe was in fact hospitalized and incompetent, but that Apex could not be charged with knowledge of Ms. Lowe's mental illness simply by virtue of Ms. Hightower's notations. (*Id.* at 71a; 73a-74a.) Judge O'Brien did not upset Judge Staniec's prior finding that Apex was charged with knowledge that Ms. Lowe was hospitalized and had not received actual notice of the tax deed proceeding. (*Id.* at 73a.) Nonetheless, Judge O'Brien concluded that Apex was not required to do anything to follow up on Ms. Hightower's notations. (*Id.*) In Judge O'Brien's view, Ms. Lowe had not been denied due process because Apex had no reason to believe that Ms. Lowe was incompetent. (*Id.* at 70a; 73a-74a.)

Illinois Appellate Court Proceeding

On appeal to the Appellate Court of Illinois, First District, the Public Guardian argued that Ms. Hightower's notations certainly put Apex on notice that Ms. Lowe was hospitalized and had not received actual notice, even if they did not show incompetence. According to the Public Guardian, Ms. Lowe's whereabouts were readily

ascertainable, and easily would have been ascertained through the exercise of constitutionally required diligence. (App. Ct. Br. 38-40.)

The Appellate Court affirmed. (Pet. App. 44a-62a.) Like the trial court, the Appellate Court concluded that Apex's knowledge of Ms. Lowe's hospitalization did not provide knowledge as to her mental incapacity. (Pet. App. 54a.) The Appellate Court did not consider whether Apex's knowledge of Ms. Lowe's hospitalization required it to undertake reasonable, additional investigation to ascertain her whereabouts.

Illinois Supreme Court Proceeding

On appeal to the Supreme Court of Illinois, the Public Guardian again urged that Ms. Hightower's notations put Apex on notice that Ms. Lowe was hospitalized, that Apex had a duty to investigate further her whereabouts, and that any such investigation would have led to locating Ms. Lowe at TPMHC, the state mental hospital, and providing Apex with knowledge of Ms. Lowe's mental illness. (Ill. Sup. Ct. Br. 38.) The court rejected these arguments. First, the court held that the Public Guardian had not made the showing of fraud or deception required to set aside the tax deed under Illinois statutory law. (Pet. App. 23a.) Second, the court held that it lacked the power under Illinois law to set aside the tax deed on equitable grounds. (Pet. App. 26a.) Third, the court, *sua sponte*, held that the trial court's *ex parte* finding of "diligent inquiry" (based on Illinois state statutory and constitutional standards) precluded any federal constitutional challenge to the sufficiency of Apex's efforts. (Pet. App. 37a.) Finally, the court categorically rejected all of the Public Guardian's other due process claims. (Pet. App. 38a-42a.)

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS GRANTED CERTIORARI TO DECIDE THE QUESTION WHETHER THE DUE PROCESS CLAUSE REQUIRES THE PARTY RESPONSIBLE FOR GIVING NOTICE TO UNDERTAKE ANY ADDITIONAL EFFORT TO LOCATE A HOMEOWNER WHOSE PROPERTY IS ABOUT TO BE SOLD, AFTER A MAILED NOTICE HAS BEEN RETURNED UNDELIVERED.

The first of the three questions presented in this petition is substantially the same as the question presented in *Jones v. Flowers*, No. 04-1477, pet. for cert. granted, Sept. 27, 2005:

> When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to make any additional effort to locate the owner before taking the property?

By granting review in *Jones*, this Court has decided that this is an important question of federal constitutional law warranting review by this Court. For the reasons set forth in the merits briefs filed by the petitioner in *Jones*, petitioner believes that the first question presented in the instant petition should be decided in favor of petitioner.

Because the Court's decision in *Jones* may control the outcome in this case, petitioner respectfully suggests that the Court hold the instant petition pending the Court's decision in *Jones*, at which time the Court may wish to grant certiorari and decide the additional questions presented in this petition, or, alternatively, vacate the judgment of the Supreme Court of Illinois and remand the case to that court for further proceedings consistent with the Court's decision rendered in *Jones*.

II. WHETHER, EVEN IN THE ABSENCE OF ANY GENERAL DUTY TO MAKE ADDITIONAL EFFORTS TO LOCATE THE HOMEOWNER BEFORE HER PROPERTY IS TAKEN, THE DUE PROCESS CLAUSE IMPOSES SUCH A DUTY WHERE THE RETURNED, UNDELIVERED NOTICE EITHER SHOWS THE HOMEOWNER'S ACTUAL WHEREABOUTS OR CONTAINS INFORMATION, SUCH AS THE FACT OF HER HOSPITALIZATION, WHICH IS REASONABLY LIKELY TO LEAD TO THE DISCOVERY OF HER WHEREABOUTS OR THE FACT OF HER MENTAL INCAPACITY, IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

1. In *Jones*, notices repeatedly were sent to the address of the property and returned undelivered. *See* Pet. for writ of cert. No. 04-1477. The same occurred here, but with one significant difference. In *Jones*, the notices were simply returned, with no further clue or comment. In the case at bar, however, the envelopes in which the notices were sent to Ms. Lowe and "occupant" were returned with a notation made by the letter carrier who regularly delivered mail along the route on which the property was located. This notation stated that "Person is Hospitalized" and was accompanied by the letter carrier's initials and route number.[6]

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[6] In addition, Apex, which purchased Ms. Lowe's home for $347.61, based on Ms. Lowe's failure to pay taxes amounting to $110.65, physically inspected the property and determined that neither Ms. Lowe nor anyone else was living there. (Pet. App. at 94a.) Apex's representative apparently talked with a neighbor, but did not ask the neighbor whether he or anyone else either knew Ms. Lowe's whereabouts or how to contact her. (*Id.*) Nor did the representative disclose the reason for his visit. Apex nonetheless sent its notices to the address of

This notation therefore put Apex on notice of three sets of facts: *First*, Ms. Lowe was not at the property to which Apex had sent notice, was not receiving mail sent to that address, and was hospitalized. *Second*, there was a simple means of ascertaining Ms. Lowe's actual whereabouts in that the letter carrier not only informed Apex that Ms. Lowe was hospitalized, but put her initials and route number on the envelope, so that Apex easily could have followed up with the letter carrier, found out where Ms. Lowe was hospitalized, and provided her with actual notice. *Third*, if Apex had followed up with the letter carrier, Apex would have learned that TPMHC, the place of Ms. Lowe's hospitalization, was a state mental institution, and that Ms. Lowe was incompetent and hospitalized for mental illness.[7]

This case therefore presents an additional question not presented in *Jones*, namely, whether the Due Process Clause requires the party giving notice to undertake reasonable additional efforts when the returned notice reveals *on its face* information reasonably likely to lead to the discovery of the owner's actual whereabouts and mental incapacity. In other words, must the party responsible for giving notice respond to additional specific information it receives in its initial attempt at service and undertake some additional effort to locate the homeowner before the property may be taken?

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the property. Ms. Lowe, of course, was confined to a state mental institution at the time.

[7] In addition, it was widely known in the neighborhood that Ms. Lowe suffered from mental illness, that she was periodically hospitalized as a result, and that she was confined to TPMHC during the time Apex attempted to serve notice (SR 56-57, 59-60, 82-83) -- facts that would have been obvious to Apex if it had undertaken any effort to ascertain Ms. Lowe's current location from the neighbors, or the letter carrier, rather than simply attempting to establish that Ms. Lowe was not living at the property Apex hoped to acquire for $347.61.

2. With respect to this second question, the courts are also split. For example, the Arkansas Supreme Court has held that service of notice by mail on a party's last known address is sufficient, and that no further efforts need be taken, even where a mailed notice has been returned with the notation that a forwarding order has expired, thus indicating that a more current address is available. *See Tsann Kuen Enterprises Co. v. Campbell*, 355 Ark. 110, 119-26, 129 S.W.3d 822, 828-32 (2003).

In contrast, the South Carolina Court of Appeals, when confronted with almost the identical situation, held that a party must follow up on a such a notation. In *Benton v. Logan*, 323 S.C. 338, 342, 474 S.E.2d 446, 448 (S.C. Ct. App. 1996), the court held that:

> When the treasurer received back the envelope marked "Forwarding Order Expired," it was quite apparent that Benton had a better address than the one to which the treasurer had sent the notice. We therefore hold the exercise of due diligence under the circumstances of this case required some further inquiry.

See also McBain v. Hamilton Co., 744 N.E.2d 984, 989 (Ind. Ct. App. 2001) (county's notice of tax sale was insufficient under *Mullane* where returned envelope was marked with owners' new address, but was disregarded by county); *Jackson Construction Co. v. Marrs*, 100 P.3d 1211, 1217 (Utah 2004) (imposing a broad duty under *Mullane* to "take advantage of readily available sources of relevant information").

Here, the Supreme Court of Illinois substantially concurred in the Arkansas Supreme Court's understanding of the Due Process Clause. As a matter of state law, the Illinois court thought that Apex had no duty to follow up on Ms.

Hightower's notations, which easily would have led to knowledge that Ms. Lowe was residing at a state mental institution and incompetent. (Pet. App. 22a.) The court apparently thought that federal constitutional law likewise required no further inquiry. (Pet. App. 37a-42a.) Thus, the court effectively held that mailing notice to an interested party at a location that is known to be abandoned constitutes a sufficient effort at providing actual notice under the Fourteenth Amendment, regardless of the fact that information likely to lead to a forwarding address is readily and obviously available. (*Id.* at 37a.)

3. Moreover, the South Carolina decision in *Benton* is consistent with this Court's prior decisions, while the Supreme Court of Illinois's decision and the decision of the Arkansas Supreme Court in *Tsann* are not. *See, e.g., Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983); *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Covey v. Town of Somers*, 351 U.S. 141 (1956); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

In *Mullane*, 339 U.S. at 314-15 (emphasis added), this Court held that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections .... But if *with due regard for the practicalities and peculiarities of the case* these conditions are reasonably met the constitutional requirements are satisfied.

Likewise, in *Mennonite Board,* 462 U.S. at 798, the Court held that, unless a party is "not reasonably identifiable,

constructive notice alone does not satisfy the mandate of *Mullane*."

In *Covey,* notice was given and actually received by the homeowner, but the party responsible for giving notice knew that the homeowner was mentally incompetent and incapable of understanding the notice provided. 351 U.S. at 144-46. This Court therefore held that notice was ineffective in the circumstances. *Id.* at 146-47. Similarly, in *Robinson*, the Court found that notice sent by the government to a person's home address was ineffective when the government knew that the person was incarcerated. 409 U.S. at 38-40.

In the circumstances of this case, and giving "due regard" to the fact that Apex could have identified Ms. Lowe's location (and, thus, her mental incompetence as well) through reasonable (indeed, minimal) additional efforts -- simply by following up on the letter carrier's notation, or questioning the neighbors -- the efforts undertaken by Apex were not sufficient to satisfy due process requirements. Not requiring Apex to take such additional steps is hardly consistent with the central meaning of *Mullane*, that is, that the action taken be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. Nor is it consistent in spirit with all of this Court's prior cases, which require that adequate notice be something "more than a feint." *Cf. id.*[8]

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[8] The Supreme Court of Illinois attempted to distinguish *Covey*, holding that Apex's knowledge of Ms. Lowe's hospitalization did not by itself constitute knowledge of her mental incapacity. (Pet. App. 36a.) But that misses the point. If Apex had simply followed up with Ms. Hightower, the letter carrier, Apex would have learned where Ms. Lowe was hospitalized, that the hospital was a state mental institution, and that Ms. Lowe was mentally incompetent. Apex also could have learned that information from the neighbors, as Ms. Hightower did.

In sum, the second question presented in this petition, like the first, presents an important question of federal constitutional law on which the state courts, which are most likely to be responsible for enforcing federal constitutional law in this context, are divided. Depending upon the Court's resolution of the issue presented in *Jones*, the Court may wish to grant the instant petition and afford plenary consideration to the second question presented in this petition. Alternatively, the Court may wish to vacate the judgment and remand the case to the Supreme Court of Illinois for further proceedings not inconsistent with the decision in *Jones*.

III. WHETHER, CONSISTENT WITH THE DUE PROCESS CLAUSE, A FINDING OF "DUE DILIGENCE," MADE AS A MATTER OF STATE LAW IN AN EX PARTE PROCEEDING, MAY FORECLOSE A HOMEOWNER WHO DID NOT RECEIVE ACTUAL NOTICE OF THE PROCEEDING, FROM CHALLENGING THE SUFFICIENCY, ON FEDERAL CONSTITUTIONAL GROUNDS, OF EFFORTS MADE TO DETERMINE HER WHEREABOUTS, IS AN ADDITIONAL QUESTION WARRANTING REVIEW.

The Supreme Court of Illinois extensively discussed the merits of Ms. Lowe's federal due process claims, but also held (Pet. App. 37a) that the trial court's *ex parte* finding of "due diligence," made as a matter of state law when it granted the tax deed (Pet. App. 88a-90a), was dispositive of Ms. Lowe's federal constitutional claim.[9] The Supreme

[9] The Circuit Court's *ex parte* "finding" could not preclude Ms. Lowe from raising her federal constitutional claim because the Circuit Court did not address that issue. The Circuit Court held only that Apex had "fully

Court of Illinois reached this issue *sua sponte*, without the benefit of briefing by the parties.

Of course, Ms. Lowe could not object at the time of the trial court's *ex parte* hearing, for the simple reason that Apex had not taken adequate steps to ensure that Ms. Lowe received notice of the proceeding. Moreover, this holding of the Supreme Court of Illinois clearly conflicts with this Court's prior decisions, which establish that a party may not constitutionally be deprived of the opportunity to contest the sufficiency of notice by virtue of not having received notice in the first instance. *See Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In sum, this aspect of the decision below is patently in conflict with settled decisions of this Court. If the Court grants plenary consideration of the second question presented, the Court should grant review with respect to this question as well. If the Court vacates and remands based on the other two questions presented, the Court may wish to vacate and remand on this ground as well. Alternatively, the Court may wish to grant summary reversal on this ground.

CONCLUSION

Petitioner respectfully requests that the Court hold this petition pending the decision in *Jones v. Flowers*. In the event that the Court reverses the judgment of the Arkansas Supreme Court in *Jones*, the Court will wish to vacate the decision below and remand to the Supreme Court of Illinois

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complied with all of the Statutes and the Constitution *of the State of Illinois* relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto." (Pet. App. 89a) (emphasis added). Contrary to the apparent misunderstanding of the Supreme Court of Illinois (*see* Pet. App. 37a), the Circuit Court made no determination as to the sufficiency of Apex's efforts under the *federal* due process clause.

for further consideration in light of this Court's decision in *Jones*. Alternatively, in the event that the Court should decide to affirm the decision of the Arkansas Supreme Court in *Jones*, the Court may wish either to grant certiorari in this case and consider the additional questions not raised in *Jones*, or to vacate the judgment below and remand the case to the Supreme Court of Illinois, so that court may consider those additional questions in the first instance in light of this Court's decision in *Jones*. Finally, the Court may wish to grant summary reversal with respect to the third question presented.

Respectfully submitted,

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January 18, 2006

APPENDIX

Appendix A

Supreme Court of Illinois.

In re APPLICATION OF the COUNTY COLLECTOR for Judgment and Sale Against Lands and Lots Returned Delinquent for Nonpayment of General Taxes and/or Special Assessments for the Years 1991 and Prior Years (Apex Tax Investments, Inc., et al., Appellees, v. Mary Lowe, Deceased, by Patrick T. Murphy, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe, Appellant).

No. 97165.

Oct. 20, 2005.

Justice McMORROW delivered the opinion of the court:

Apex Tax Investments, Inc. (Apex), purchased the home of Mary Lowe at a tax sale and was issued a tax deed for the property by order of the circuit court of Cook County. Subsequently, the Cook County public guardian, on behalf of the estate of Mary Lowe, filed an amended petition pursuant to section 2- 1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)) and section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)) seeking to have the tax deed set aside. In the amended petition, the public guardian alleged that at the time Apex attempted to provide Lowe with the notice required by section 22-10 of the Property Tax Code (35 ILCS 200/22- 10 (West 1994)), Lowe was hospitalized for schizophrenia. The public guardian further alleged that Apex should have known of Lowe's mental impairment based on notations made by a mail carrier on the envelopes of two letters that were mailed to Lowe but returned, undelivered. Based on these allegations, the public

guardian contended that Apex had not complied with the statutory notice requirements of the Property Tax Code and that Lowe's "due process right to adequate notice" had been violated.

Following a hearing, the circuit court denied the public guardian's petition. The appellate court affirmed. No. 1-02-1101 (unpublished order under Supreme Court Rule 23). For the reasons that follow, we affirm the judgment of the appellate court.

BACKGROUND

The procedures governing tax sales and the issuance of tax deeds are set forth in article 21, division 4, and article 22 of the Property Tax Code. 35 ILCS 200/21-190 *et seq.*, 22-5 *et seq.* (West 1994). Pursuant to section 21-190, the county collector may offer property for public sale when judgment has been rendered against that property for nonpayment of real estate taxes. The buyer of property at such a sale does not receive title to the property but, instead, receives a "certificate of purchase." 35 ILCS 200/21-250 (West 1994). The issuance of a certificate of purchase does not affect the delinquent property owner's legal or equitable title to the property. *Phoenix Bond & Indemnity Co. v. Pappas*, 194 Ill.2d 99, 101, 251 Ill.Dec. 654, 741 N.E.2d 248 (2000). The property owner has the right to redeem the property, upon the payment of the tax arrearage and costs, until such time as the redemption period expires. 35 ILCS 200/21-345 through 21-355 (West 1996); Ill. Const.1970, art. IX, § 8.

"[W]ithin 5 months but not less than 3 months prior to the expiration of the redemption period," the tax purchaser may file a petition in the circuit court asking the court to enter an order directing the county clerk to issue a tax deed to the property. 35 ILCS 200/22-30 (West 1994). Before the tax purchaser may receive such an order, however, the

redemption period must expire without any redemption taking place. In addition, as a condition to receiving a tax deed order, the tax purchaser must prove to the circuit court that it has strictly complied with the statutory notice provisions set forth in sections 22-10 through 22-25 of the Property Tax Code (35 ILCS 200/22-10 through 22-25 (West 1994)). See 35 ILCS 200/22-40 (West 1994).

In the case at bar, Apex purchased a parcel of residential real estate at the annual Cook County tax sale held on March 3, 1993. The property was improved with a single-family, split-level townhouse. On October 5, 1995, Apex filed a petition for a tax deed to the property in the circuit court of Cook County. Attached to the petition was Apex's certificate of purchase, which indicated that the property had been purchased for $347.61, the amount of a 1991 tax delinquency. The petition also stated that the redemption period expired by extension on February 21, 1996. See 35 ILCS 200/21-385 (West 1994). No redemption occurred by that date, and Apex's petition proceeded to an *ex parte* hearing before Judge Marjan Staniec on March 18, 1996. See 35 ILCS 200/22-40 (West 1994).

At the hearing, Apex's attorney informed the court about the efforts that had been made to comply with the statutory notice provisions of the Property Tax Code. Apex's attorney told the court that, from a tract search, Apex had learned that the property at issue was owned by two individuals, Mary Lowe and William Austin, and that this information was conveyed to the Cook County sheriff and the clerk of the circuit court of Cook County. On October 26, 1995, in accordance with section 22-15 of the Property Tax Code (35 ILCS 200/22-15 (West 1994)), the Cook County sheriff attempted to personally serve Lowe, Austin and "occupant" with the "take notice" set forth in section 22-10. The section 22-10 take notice must be given "not less than 3 months nor

more than 5 months prior to the expiration of the period of redemption." 35 ILCS 200/22- 10 (West 1994). The notice must state, *inter alia*, that the property at issue has been sold for delinquent taxes, that the period of redemption expires on the date listed, that a petition for a tax deed has been filed, and that a hearing on the tax deed petition will be held at the time and place listed. See 35 ILCS 200/22-10 (West 1994).

As required by statute (see 35 ILCS 200/22-20 (West 1994)), the Cook County sheriff filed the returns of service for the section 22-10 take notices with the clerk of the circuit court. The returns of service were filed with the clerk on November 9, 1995, and were admitted into evidence during the hearing on Apex's petition. On each of the returns of service, the deputy sheriff who attempted to serve the notice wrote "House vacant per neighbors." The deputy sheriff also placed a mark next to the word "MOVED" on the preprinted form to indicate the reason why notice was not served.

Having failed to effect personal service on Austin, Lowe or "occupant," the sheriff also sent take notices to them at the property's address by certified mail, return receipt requested. See 35 ILCS 200/22-15 (West 1994). These three notices were returned to the sheriff, undelivered, and were subsequently filed with the clerk of the circuit court. At the hearing on Apex's petition, the envelopes for the three notices were admitted into evidence. The record on appeal contains the original, unopened envelope addressed to Austin, and photocopies of the envelopes addressed to Lowe and "occupant."

All three envelopes are postmarked November 8, 1995, and are stamped "returned to sender." On the envelope addressed to Austin, the word "deceased" is handwritten in pencil on the left side of the envelope. The sheriff filed this envelope with the clerk of the circuit court on November 22, 1995. The envelopes addressed to Lowe and "occupant" bear

a stamp which indicates that attempts were made to deliver the notices on November 16, December 11, and December 18, 1995. In addition, on the left side of these two envelopes, written vertically, is a handwritten notation which reads: "Person is Hospitalized." Underneath these notations on both envelopes, also handwritten, is a number, "2719," and the letters "JHT." The notations on both of the envelopes have a line drawn through them and are obscured, in part, by the circuit court clerk's filing stamp and the post office's "returned to sender" stamps. The sheriff filed the envelopes addressed to Lowe and "occupant" with the clerk of the circuit court on January 2, 1996. Neither Apex's attorney nor the circuit court mentioned the notations on the envelopes at any time during the hearing on Apex's tax deed petition.

In accordance with section 22-25 of the Property Tax Code (35 ILCS 200/22-25 (West 1994)), the clerk of the circuit court of Cook County also sent take notices by certified mail addressed to Lowe, Austin and "occupant." Like the notices sent by the sheriff, these notices were returned, undelivered. The notices were filed in the court record (see 35 ILCS 200/22-25 (West 1994)) and were admitted into evidence at the hearing. The envelopes for the notices sent to Austin and "occupant," as well as a photocopy of the envelope sent to Lowe, are part of the record on appeal. All three envelopes are postmarked November 8, 1995, and are stamped "returned to sender." Notations on the envelopes indicate that attempts were made to deliver the notices on November 9, November 15, and November 24, 1995. The clerk of the circuit court filed the notices addressed to Lowe and "occupant" in the court record on November 29, 1995, and the notice addressed to Austin on November 30, 1995.

Pursuant to sections 22-15 and 22-20 of the Property Tax Code (35 ILCS 200/22-15, 22-20 (West 1994)), Apex also

provided publication notice to Lowe and Austin. The same notices that were sent by mail to the property were published in the Chicago Daily Law Bulletin on October 11, October 12, and October 13, 1995.

During the hearing on Apex's petition, Apex's attorney informed the court that Mary Lowe had conveyed her home through a quitclaim deed to herself and Austin, as joint tenants, in 1993. Apex's attorney explained to the court that, "attempting to be diligent in ascertaining the whereabouts" of Lowe and Austin, the Cook County sheriff had personally served the law firm which prepared the 1993 quitclaim deed with a section 22-10 take notice. In addition, the clerk of the circuit court sent notice to the firm by certified mail on November 8, 1995. The First National Bank of Chicago, in its capacity as a mortgagee of the property, was also personally served with a take notice on October 24, 1995. And, the clerk of the circuit court sent notice by certified mail to the bank on November 8, 1995.

Apex's agent, Fred Berke, also testified at the hearing regarding the efforts Apex made to locate Lowe and Austin. Berke stated that he had visited the property at issue and inspected it on Apex's behalf. Berke testified that after arriving at the townhouse, he knocked on the door and looked in the living room window. He saw no furniture inside the home. He also spoke to a next-door neighbor who told him that the owner of the property was "the Lowes" but that no one was currently living there. Berke told the court that the home appeared to be uninhabited.

Finally, Apex's attorney stated to the court that, after taking the preceding actions, and after checking city and suburban phone directories and voter registration records, Apex was "unable to develop any address for William Austin or Mary Lowe other than the subject property address."

According to Apex's attorney, "all regular efforts" to locate Lowe and Austin had "proved fruitless."

At the close of the hearing, the circuit court found that the redemption period had expired and that no redemption had been made. The court further found that Apex had complied with the notice provisions of the Property Tax Code. The court found, in particular, that Apex had exercised "due diligence" in attempting to locate Lowe and Austin, thereby satisfying the requirement set forth in section 22-15 that the tax purchaser make a "diligent inquiry" to find the property owner and interested parties. 35 ILCS 200/22-15 (West 1994). The circuit court continued the matter to allow Apex to provide a transcript of the proceedings and to submit proof of its payment of taxes for the years subsequent to 1991. See 35 ILCS 200/22-40 (West 1994). Thereafter, on May 20, 1996, the circuit court entered a written order which stated that, "upon proofs and exhibits heard and offered in open court," the court had found that Apex "fully complied with all of the Statutes and the Constitution of the State of Illinois relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto." The order directed the county clerk to issue Apex a tax deed to the property, and the deed was issued that same day.

Approximately seven months later, on December 6, 1996, Apex entered into an installment contract to sell the property to a third-party, John Herndon. Under the terms of this contract, Herndon was to pay a total of $10,000 for the property, with $3,000 in earnest money to be applied to the purchase price, and a $2,000 payment due on December 9, 1996. The final installment payment was due March 31, 1999. In deposition testimony taken on March 10, 1999, Herndon stated that he had made a $3,000 and a $2,000 payment to Apex, but that he had not, as of that date, paid anything further on the contract. He also stated that he had

not closed on the home, and that he had not received a deed for the property.

Herndon further stated in his deposition testimony that the property was in substantial disrepair when he purchased it. According to Herndon, there was garbage and water throughout the house, windows were broken, and the front door was "wide open." Herndon described the home as "an abandoned building." Herndon stated that, after entering into the installment contract with Apex, he invested over $20,000 in material and labor into renovating the property. Although it is not clear from the record precisely when these renovations began, it appears that they were completed by early 1998.

Approximately nine months after Apex entered into the contract with Herndon, on September 5, 1997, two of Mary Lowe's sons, Bruce and Mario Lowe, filed a *pro se* petition for "Restoration of Property Ownership" in the circuit court of Cook County. In this petition, Bruce Lowe stated that his mother had "been in and out of various mental facilities for the past 30 years of her life," and that she had been hospitalized in a mental health facility from August 26, 1995, to December 17, 1996. Bruce further stated that his mother had been released to his custody and that she was currently residing with him in California. Bruce also contended in the petition that personal service on an incompetent individual violates the individual's right to due process and asked the court to "reinstate full rights of ownership to Mary Lowe."

Based on Bruce Lowe's allegation that his mother was mentally disabled, the circuit court appointed the Cook County public guardian to represent Mary Lowe in early November 1997. On November 10, 1997, the public guardian filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)) and section 22-45 of the Property Tax Code (35 ILCS 200/22-45

(West 1994)), seeking to have the tax deed that had been issued to Apex set aside. An amended petition was filed on April 17, 1998.

In the amended petition, the public guardian alleged that Mary Lowe suffered from schizophrenia and that she had been hospitalized in the Tinley Park Mental Health Center at the time the section 22-10 take notices were sent to her property in November 1995. The petition also noted that two of the notices mailed by the Cook County sheriff had been returned with the notations "Person is hospitalized 2719 JHT" written on the envelopes. The petition alleged that these notations were written by a mail carrier, Jewel Hightower, and that the number "2719" was her postal route number and the letters "JHT" were her initials. The petition further alleged that Apex never attempted to contact Hightower or the post office. Therefore, according to the public guardian, Apex "failed to make a diligent inquiry" as to the whereabouts of Mary Lowe and failed to satisfy the notice requirements of the Property Tax Code.

The public guardian's petition also asserted that Mary Lowe had been denied her "due process right to adequate notice" prior to the deprivation of her real property. In support of this contention, the public guardian cited to *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), wherein the Supreme Court held that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [the requirements of due process]." *Covey*, 351 U.S. at 146, 76 S.Ct. at 727, 100 L.Ed. 1026. In addition, the petition asserted that Lowe's due process rights were violated because, given Lowe's mental disability, even if she had received the notices mailed by Apex to her home, those notices would have been meaningless to her.

On August 12, 1998, John Herndon filed a motion to dismiss the public guardian's amended petition. In this petition, Herndon contended that, by virtue of his December 6, 1996, contract with Apex, he was a *bona fide* purchaser of the property at issue. In a subsequent filing, Herndon further contended that, after he paid $5,000 to Apex under the installment contract, and spent over $20,000 in improvements on the property, an equitable conversion occurred (see *Shay v. Penrose*, 25 Ill.2d 447, 185 N.E.2d 218 (1962)), and he became a *bona fide* purchaser of the property on this basis as well. Citing to subsection (e) of section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(e) (West 1994)) Herndon argued that a *bona fide* purchaser's interest in property cannot be affected by the filing of a section 2-1401 petition and, therefore, that the public guardian's amended petition should be dismissed.

In written order entered on June 8, 1999, the circuit court rejected Herndon's arguments. Relying on *Daniels v. Anderson*, 162 Ill.2d 47, 60-61, 204 Ill.Dec. 666, 642 N.E.2d 128 (1994), the court determined that Herndon's contract with Apex did not render Herndon a *bona fide* purchaser because Herndon had knowledge of Mary Lowe's interest in the property in August 1998, several months before he would have acquired title to the property under the terms of the contract. The circuit court also rejected Herndon's equitable conversion theory. The court reasoned that Apex knew or should have known that Lowe was hospitalized, based on the notations written by Jewel Hightower on the returned envelopes. The circuit court concluded, without further elaboration, that Apex's actual or constructive knowledge of Lowe's hospitalization should be imputed to Herndon and, therefore, that the "equitable conversion theory [was] not applicable and that Herndon at his own risk undertook to purchase and to rehab the property."

On August 18, 2000, the public guardian filed a motion to stay proceedings. In this motion, the public guardian stated that it had recently learned that Mary Lowe died on November 15, 1998, and that since that time, Bruce Lowe had "fraudulently misrepresented to the Public Guardian" that she was alive[1]. The public guardian sought to stay the proceedings, "pending the appointment of an appropriate representative, for the estate of May Lowe, to pursue the Petition to Set Aside the Tax Deed." On September 6, 2000, the circuit court entered an order dismissing the amended petition to set aside the tax deed.

Thereafter, the probate division of the circuit court of Cook County entered an order appointing the public guardian as administrator to collect for the estate of Mary Lowe. The public guardian then filed a motion to vacate the circuit court's order of September 6, 2000, and to substitute the public guardian as the proper party to prosecute the amended petition to set aside the tax deed. In a written filing, Apex contested this motion. Apex disputed whether the public guardian had, in fact, ever been appointed to represent Mary Lowe, and further contended that any such representation of Mary Lowe should not have been permitted under the relevant statutory authority. In response, the public guardian submitted a written filing that included an affidavit from Judge Staniec, who had retired from the bench in July 1999. In this affidavit, Judge Staniec confirmed that he had appointed the public guardian to represent Lowe in November of 1997. Judge Staniec also stated that, if he had

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[1] In a letter to the public guardian, Bruce Lowe apologized for not disclosing his mother's death. Bruce stated that he did not inform the public guardian of Mary Lowe's death because he was concerned that "disclosure would further delay this matter" and that he would "lose the support of the Public Guardian's Office."

"been advised that Mary Lowe was hospitalized during the applicable notice serving periods," he would not have issued a tax deed order to Apex. On June 27, 2001, the circuit court vacated the order of September 6, 2000, and entered an order substituting the public guardian, now serving as administrator to collect for the estate of Mary Lowe, as the proper party to prosecute the amended petition.

The public guardian's amended petition to set aside the tax deed proceeded to an evidentiary hearing on February 20, 2002. At the outset, the circuit court explained that, although it had been determined that Herndon was not entitled to the legal status of *bona fide* purchaser, he would be allowed to participate in the hearing because he had purchased the property at issue.

The public guardian was the only litigant to present testimony at the hearing. Dr. Bernard Rubin, an expert in the field of psychiatry, was the public guardian's first witness. Rubin testified that he reviewed Mary Lowe's mental-health records from 1964 through 1996 and spoke to Mary Lowe's son, Bruce Lowe, by telephone on four occasions. Rubin never spoke to, or saw, Mary Lowe.

From his review of her mental-health records, Rubin concluded that Mary Lowe suffered from disorganized, chronic schizophrenic disorder, the most severe from of schizophrenia. Rubin stated that Lowe suffered from intermittent bouts of schizophrenia from the early 1960s until 1995. In January 1995, following the death of her companion, William Austin, Lowe was hospitalized briefly in the Tinley Park Mental Health Center. She was admitted to that hospital in August 1995 and remained there until her discharge in December 1996. Rubin stated that, from January 1995 until October 1996, Lowe suffered from a mental illness, was generally incompetent, and had no capacity to care for her personal needs or to fulfill social or business

responsibilities. According to Rubin, Lowe would not have been able to understand, or respond to, legal documents served upon her between January 1995 and October 1996. Rubin stated that psychotropic medication began to improve Lowe's condition in October 1996 and that she was subsequently released to the custody of her son.

The public guardian also offered testimony from Jewel Hightower. Hightower testified that she worked for the United States Postal Service as a mail carrier and that the property at issue in this case was on her delivery route. Hightower stated that she wrote "person is hospitalized" on the letters sent by the sheriff to Mary Lowe and "occupant" and returned the letters to their sender. Hightower further stated that the number "2719," which appeared under the words "person is hospitalized," was her postal route number and that the letters "JHT" were her initials. Hightower stated that, although she knew Lowe was in the Tinley Park Mental Health Center at the time the take notices from the sheriff were sent to Lowe, she did not provide this information on the envelopes. According to Hightower, postal regulations allowed her to note that an addressee was hospitalized but did not allow her to note anything more specific. Hightower also explained that someone wanting to learn of Lowe's exact whereabouts could have done so if they had come to the post office and filled out the "proper forms."[2] Hightower stated that neither she, nor anyone at the post office, was contacted about the notations on the envelopes.

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[2] Hightower did not further identify the statue or regulation which would authorize the postal service to disclose Mary Lowe's hospitalization in a mental-health facility.

On April 9, 2002, the circuit court denied the public guardian's amended petition to set aside the tax deed. In a ruling issued from the bench, the circuit court noted that the amended petition was brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)) as limited by section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)). The court further noted that under subsection (3) of section 22-45 of the Property Tax Code, a tax deed may be set aside when there is "proof by clear and convincing evidence" that the tax deed order was "procured by fraud or deception." 35 ILCS 200/22-45(3) (West 1994). The circuit court reviewed the evidence of record and concluded that Apex had not procured its tax deed order through fraud or deception.

With respect to the public guardian's constitutional arguments, the circuit court stated that the notice provisions of the Property Tax Code, "as applied, can result in a due process violation where a person with an interest in the property is mentally incompetent and the tax deed petitioner either knew or reasonably should have known [of] that disability." The circuit court found that Dr. Rubin's opinion that Mary Lowe was incompetent was correct and noted that "given Ms. Lowe's capacity, even if she had received that notice, she wouldn't have been able, in all likelihood, to understand or act upon it." However, the circuit court also noted that an individual may be hospitalized for many reasons that have nothing to do with mental illness. From this, the court determined that, even if the notations made by Jewel Hightower alerted Apex to the fact that Lowe was hospitalized, that did not mean that Apex knew, or should have known, that Lowe was mentally impaired. Because Apex had no knowledge of Lowe's impairment, the court concluded there was no due process violation.

The appellate court, adopting much of the circuit court's reasoning, affirmed. No. 1-02-1101 (unpublished order under Supreme Court Rule 23). We granted the public guardian's petition for leave to appeal. 177 Ill.2d R. 315(a). We also granted leave to the Mental Health Association in Illinois and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic to file an *amicus curiae* brief in support of the estate of Mary Lowe.

ANALYSIS

The public guardian advances both statutory and constitutional grounds for relief. We first consider the public guardian's statutory arguments.

Statutory Relief

The public guardian's petition to set aside the tax deed issued to Apex is a collateral attack upon the circuit court's tax deed order, brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1994)). Collateral attacks upon tax deed orders implicate two competing public policies. On the one hand, "[t]he forced sale of a home is a grave and melancholy event" (*Smith v. D.R.G., Inc.*, 63 Ill.2d 31, 39, 344 N.E.2d 468 (1976)) that can have severe consequences for the delinquent taxpayer. Allowing a collateral attack upon the tax deed order provides the delinquent taxpayer with an opportunity, in addition to the direct appeal, to ensure that the order was properly obtained. On the other hand, the availability of a collateral challenge to the tax deed order tends to undermine the finality and, hence, the marketability of the tax deed. This point is significant because tax purchasers participate in the tax sale system in order to obtain marketable titles. See *Village of Dolton v. First National Bank of Blue Island*, 12 Ill.2d 435, 440, 147 N.E.2d 62 (1957) ("Our whole system of judicial sales is based upon the public's willingness to accept titles thereby

created"). If tax purchasers do not participate in tax sales, then delinquent taxpayers lose the incentive to pay their real estate taxes and tax revenues fall. See *Cherin v. The R. & C. Co.*, 11 Ill.2d 447, 451-53, 143 N.E.2d 235 (1957); G. Turano, *Equitable Relief, Collateral Attack and the Illinois Tax Deed*, 51 Chi.-Kent L.Rev. 725, 725-26 (1975); D. Karlen & R. Slutzky, *A Guide to Tax Deed and Indemnity Fund Proceedings*, in Real Estate Taxation § 11.37, at 11-75 (Ill. Inst. for Cont. Legal Educ.2005) ("Participation by tax purchasers is essential to the tax collection process because tax purchasers represent a threat to property owners that will induce them to make timely payments").

Over the past several decades, the balance between the competing policies of ensuring the propriety of tax deed orders by permitting collateral challenges to such orders, and preserving the marketability of tax deeds, has been struck in different ways. In 1951, the legislature substantially revised the Revenue Act of 1939 (Ill.Rev.Stat.1951, ch. 120, par. 482 *et seq.*), the predecessor statute to the Property Tax Code. As this court has frequently noted, these revisions were undertaken, in large part, to improve the marketability and validity of tax titles in order to reduce real estate tax delinquencies. See, e.g., *In re Application of the County Treasurer*, 92 Ill.2d 400, 406, 65 Ill.Dec. 905, 442 N.E.2d 216 (1982) (observing that, before 1951, tax deeds "amounted to little more than a cloud on the title of the delinquent owner"); L. Dotson, Note, 40 *Chi.-Kent L.Rev.* 155, 157-58 (1963). Prior to the 1951 revisions, the decision as to whether the statutory requirements for obtaining a tax deed had been met, including whether notice requirements had been satisfied, was made administratively, by the county clerk. The 1951 revisions altered this practice and made the issuance of the tax deed a judicial decision, made by the county court upon petition. Ill.Rev.Stat.1951, ch. 120, par. 747; *In re Application of the County Treasurer*, 214 Ill.2d

253, 262, 291 Ill.Dec. 758, 824 N.E.2d 614 (2005); *Cherin*, 11 Ill.2d at 451-53, 143 N.E.2d 235. Section 266 of the Revenue Act was also amended to provide that the tax deed order would be "incontestable" except by direct appeal. Ill.Rev.Stat.1951, ch. 120, par. 747; *Cherin*, 11 Ill.2d at 453, 143 N.E.2d 235. No provision in the Revenue Act allowed for collateral challenges to the tax deed order. Further, section 266 was amended to state that it was to "be liberally construed so that tax deeds herein provided for shall convey merchantable title." Ill.Rev.Stat.1951, ch. 120, par. 747.

Seven years after the 1951 revisions to the Revenue Act, in *Southmoor Bank & Trust Co. v. Willis*, 15 Ill.2d 388, 155 N.E.2d 308 (1958), this court addressed the "delicate problem" of construing section 266 of the Revenue Act, which, as noted, did not permit collateral attacks upon tax deed orders, with section 72 of the Civil Practice Act (Ill.Rev.Stat.1957, ch. 110, par. 72), the statutory predecessor to section 2-1401. *Southmoor Bank*, 15 Ill.2d at 394, 155 N.E.2d 308. Examining the two statutes, this court observed that section 72 established a uniform procedure "for obtaining relief from all final orders, judgments and decrees within its purview." *Southmoor Bank*, 15 Ill.2d at 394-95, 155 N.E.2d 308. Reasoning that section 72 and section 266 of the Revenue Act were in pari materia, we concluded "that the legislature desired to render tax titles incontestable except by direct appeal, subject to the provisions of section 72 of the Civil Practice Act." *Southmoor Bank*, 15 Ill.2d at 394, 155 N.E.2d 308. The court further noted, however, that unless a lack of jurisdiction affirmatively appeared on the record, "the prior finding of the county court of compliance with all the provisions of law entitling petitioner to a tax deed could not * * * be disputed in [the section 72] proceeding." *Southmoor Bank*, 15 Ill.2d at 396, 155 N.E.2d 308.

In *Remer v. Interstate Bond Co.*, 21 Ill.2d 504, 173 N.E.2d 425 (1961), this court again observed that a county court's findings that the statutory prerequisites to issuing a tax deed had been complied with could not be challenged collaterally, unless a lack of jurisdiction appeared on the face of the record. *Remer*, 21 Ill.2d at 510, 173 N.E.2d 425. However, this court also stated that allegations of fraud could be raised in a collateral attack upon the tax deed order. We reasoned that such allegations fit within the requirements of section 72 and that "elementary principles of law require that relief be granted" where "proceedings regular in form are tainted with fraud and coercion." *Remer*, 21 Ill.2d at 514, 173 N.E.2d 425. Thereafter, in *Urban v. Lois, Inc.*, 29 Ill.2d 542, 194 N.E.2d 294 (1963), we reiterated this rule, stating:

> "It has been well established in tax-deed proceedings that section 72 cannot be used as a vehicle to relitigate any issue already passed on by the trial court, in the absence of fraud." *Urban*, 29 Ill.2d at 548, 194 N.E.2d 294.

In so holding, we explained why the scope of collateral attack upon the tax deed order was a limited one:

> "If we were to hold otherwise, we would abrogate the efficacy of the 1951 amendments to the Revenue Act, and would defeat the desired conclusiveness of the county court's order for the issuance of a tax deed. The consequent effect upon the merchantability of tax titles would place the annual sale in the same status as existed before the 1951 amendments and which the legislature intended to change." *Urban*, 29 Ill.2d at 549, 194 N.E.2d 294.

In 1967, the legislature amended section 266 of the Revenue Act to state that relief from an order granting a tax deed could be had under section 72 of the Civil Practice Act, thereby expressly confirming this court's holding to that

effect in *Southmoor Bank*. See Ill.Rev.Stat.1967, ch. 120, par. 747.

In 1982, in *In re Application of the County Treasurer*, 92 Ill.2d 400, 408, 65 Ill.Dec. 905, 442 N.E.2d 216 (1982), this court again addressed the scope of collateral relief available in tax deed cases. After reviewing the relevant case law, as well as various revisions that had been made to the Revenue Act by the General Assembly, we concluded that the legislature intended to protect tax deed orders from collateral attack "on questions relating to notice." *County Treasurer*, 92 Ill.2d at 408, 65 Ill.Dec. 905, 442 N.E.2d 216. Accordingly, we chose to "adhere to our previous holdings that section 72 relief in tax-deed cases is limited to those cases where fraud is proved or the judgment is void." *County Treasurer*, 92 Ill.2d at 408, 65 Ill.Dec. 905, 442 N.E.2d 216.

During the 1990s, the legislature twice addressed the issue of collateral challenges to tax deed orders. In amendments to section 266 of the Revenue Act that were adopted in 1990, the General Assembly codified the holdings of decisions such as *County Treasurer* and *Urban* with respect to the grounds for relief that are available in a collateral attack upon a tax deed order. See 86th Ill. Gen. Assem., Senate Proceedings, May 10, 1990, at 62 (statements of Senator Lechowicz). In addition, the legislature created a new, statutory ground for collateral relief that is available in certain circumstances where the tax deed order "was effectuated pursuant to a negligent or willful error made by an employee of the county clerk or county collector." Ill.Rev.Stat.1991, ch. 120, par. 747. Also, the 1990 amendments added language to section 266 which states that the grounds for relief that are available in a collateral attack upon a tax deed order "shall be limited" to those enumerated in the statute. See Ill.Rev.Stat.1991, ch. 120, par. 747.

In 1993, the General Assembly created an additional statutory ground for collateral relief from a tax deed order. Generally stated, this ground may be invoked by a person or party with a recorded interest in the tax deed property who was not served with notice in any manner whatsoever. See 35 ILCS 200/22-45(4) (West 1994).

The amendments enacted by the General Assembly in 1990 and 1993 are currently found in section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)). Section 22-45 expresses the balance struck by the legislature between the public policies of allowing collateral relief from tax deed orders and preserving the marketability of tax deeds. Section 22-45 provides:

> "Tax deeds issued under Section 22-35[3] are incontestable except by appeal from the order of the court directing the county clerk to issue the tax deed. However, relief from such order may be had under Section 2-1401 of the Code of Civil Procedure in the same manner and to the same extent as may be had under that Section with respect to final orders and judgments in other proceedings. The grounds for relief under Section 2-1401 shall be limited to:
>
> (1) proof that the taxes were paid prior to sale;
>
> (2) proof that the property was exempt from taxation;
>
> (3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

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[3] This reference to "Section 22-35" has been changed to "Section 22-40." See 35 ILCS 200/22-45 (West Supp. 204).

(4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in Section 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by Sections 22-10 through 22-30.

In cases of the sale of homestead property in counties with 3,000,000 or more inhabitants, a tax deed may also be voided by the court upon petition, filed not more than 3 months after an order for tax deed was entered, if the court finds that the property was owner occupied on the expiration date of the period of redemption and that the order for deed was effectuated pursuant to a negligent or willful error made by an employee of the county clerk or county collector during the period of redemption from the sale that was reasonably relied upon to the detriment of any person having a redeemable interest." 35 ILCS 200/22-45 (West 1994).

In the case at bar, the public guardian argues that the tax deed issued to Apex should be set aside because there is "clear and convincing evidence" that the tax deed order was "procured by fraud or deception." 35 ILCS 200/22- 45(3) (West 1994). The public guardian notes that, at the hearing on Apex's petition for issuance of a tax deed order, Apex's attorney represented to the circuit court that it had strictly complied with the Property Tax Code's notice provisions, that it had been unable to ascertain Mary Lowe's whereabouts despite having conducted a diligent search, and that there were "no minors, incompetents, or estates that appear to have an interest in the property." The public guardian contends that "in view of Apex's willful ignorance with respect to the

notations on the undelivered envelopes" these representations constitute fraud or deception under section 22-45 and, therefore, that the tax deed issued to Apex should be set aside.

In the context of tax deed proceedings, fraud is defined as " 'a wrongful intent--an act calculated to deceive.' " *County Treasurer*, 92 Ill.2d at 405, 65 Ill.Dec. 905, 442 N.E.2d 216, quoting *Dahlke v. Hawthorne, Lane & Co.*, 36 Ill.2d 241, 245, 222 N.E.2d 465 (1966); see also *Smith v. D.R.G., Inc.*, 63 Ill.2d 31, 37, 344 N.E.2d 468 (1976); *Exline v. Weldon*, 57 Ill.2d 105, 110, 311 N.E.2d 102 (1974); *Zeve v. Levy*, 37 Ill.2d 404, 409, 226 N.E.2d 620 (1967). This level of wrongdoing has not been established here.

The envelopes with Jewel Hightower's notations on them were returned by the post office to their sender, the Cook County sheriff. The sheriff submitted the envelopes to the clerk of the circuit court, who then placed the envelopes in the court file which, by statute, the clerk is required to maintain in tax deed cases. See, *e.g.*, 35 ILCS 200/22-20, 22-25 (West 1994). There was nothing unusual or unexpected about the fact that the envelopes were returned, undelivered. Both an agent from Apex and a deputy sheriff from the Cook County sheriff's office had visited the property, found it vacant, and been told by neighbors that the occupants of the home had moved. Further, the notations on the envelopes addressed to Mary Lowe and "occupant," though legible, cannot reasonably be called prominent. The notations have a line drawn through them and they are partially obscured by the circuit court clerk's filing stamps and the post office's "returned to sender" stamps. More important, there is no evidence that Apex attempted to conceal the notations or alter the envelopes in any way. To the contrary, the envelopes were submitted into evidence by Apex along with the other portions of the record, and the circuit court

explicitly relied upon them in rendering its decision to enter the tax deed order.

On this record, the most that can be said with respect to Apex's actions is that Apex simply failed to discover the notations on the envelopes. However, as this court has frequently noted, the failure to undercover a particular fact during the search for a delinquent taxpayer does not, by itself, establish fraud. *Dahlke*, 36 Ill.2d at 246, 222 N.E.2d 465; *Exline*, 57 Ill.2d at 110, 311 N.E.2d 102 ("even if a more persistent effort could have been made in the conduct of the search and inquiry [for the delinquent taxpayer], this is not proof of fraud unless there exists evidence of wrongful intent or a deceptive design"); *Zeve*, 37 Ill.2d at 409, 226 N.E.2d 620; see also *County Treasurer*, 92 Ill.2d at 407-09, 65 Ill.Dec. 905, 442 N.E.2d 216 (error in service which was at most negligence did not constitute fraud). Moreover, the fact that the envelopes were submitted into evidence and relied upon by the circuit court is a strong indication that there was no deceptive or fraudulent act on the part of Apex. See *In re Application of the County Treasurer & ex officio County Collector*, 267 Ill.App.3d 993, 998-99, 204 Ill.Dec. 840, 642 N.E.2d 741 (1994) (no deceptive act takes place when all relevant information is openly presented to the court); *In re Application for Judgment & Sale by the County Treasurer & ex officio County Collector*, 276 Ill.App.3d 1084, 1090, 213 Ill.Dec. 541, 659 N.E.2d 457 (1995) (same); *In re Application of County Treasurer & Ex-Officio County Collector*, 20 Ill.App.3d 291, 298, 314 N.E.2d 300 (1974) (same).

The record in this case does not show, by clear and convincing evidence, "a wrongful intent" or "an act calculated to deceive." *Dahlke*, 36 Ill.2d at 245, 222 N.E.2d 465. Accordingly, we affirm the circuit court's judgment that the tax deed order was not obtained by fraud or deception.

Citing to *In re Application of the County Collector for Judgment & Order of Sale Against Lands & Lots Returned Delinquent for Nonpayment of General Taxes for the Year 1982 & Prior Years*, 202 Ill.App.3d 405, 147 Ill.Dec. 666, 559 N.E.2d 1006 (1990), the public guardian also argues that, even if Apex's actions were not fraudulent, this court should invoke its "equitable powers" to void the tax deed order and return the property at issue to Mary Lowe's estate. The public guardian argues that Mary Lowe lost her home through no fault of her own, and emphasizes that Judge Staniec, in the affidavit which he submitted to the circuit court, stated that he would not have issued the tax deed order if he had known that Lowe was hospitalized in 1995 and 1996. According to the public guardian, it would be unjust not to allow Lowe's estate to recover the property and, therefore, under principles of equity, the tax deed should be set aside.

In *County Collector*, a tract search prepared from a title company's own tract indices, rather than official public records, failed to disclose a properly recorded mortgage. Relying on the results of the tract search, and not knowing that the results were inaccurate, the circuit court issued a tax deed order. *County Collector*, 202 Ill.App.3d at 408-09, 147 Ill.Dec. 666, 559 N.E.2d 1006. Thereafter, the holder of the properly recorded mortgage filed a section 2-1401 petition, seeking to have the tax deed set aside. Because the tax deed order had not been obtained by fraud, the circuit court declined to vacate it. However, the circuit court stated that it would not have issued the tax deed order had it known of the recorded interest and expressed the opinion that, were equity to apply, the tax deed should be set aside. *County Collector*, 202 Ill.App.3d at 409-10, 147 Ill.Dec. 666, 559 N.E.2d 1006.

On appeal, the appellate court reversed. Citing to *In re Application of the County Treasurer & Ex Officio County Collector of Cook County, Illinois, for Judgment & Order of*

Sale Against Real Estate Rendered Delinquent for the Nonpayment of 1980 Taxes, 185 Ill.App.3d 789, 134 Ill.Dec. 218, 542 N.E.2d 397 (1989), and *In re Application of the County Treasurer & Ex Officio County Collector*, 171 Ill.App.3d 644, 121 Ill.Dec. 545, 525 N.E.2d 852 (1987), two cases in which tax deeds were set aside because of errors committed by the county clerk, the appellate court concluded that not all circumstances under which tax deeds should be set aside fit within the framework of fraud. The appellate court held that "equitable principles" may be relied upon by the courts under section 2-1401 "to afford relief for parties who, through no fault of their own (and through no fraud by any party), stand to lose property in which they have a considerable interest." *County Collector*, 202 Ill.App.3d at 414-15, 147 Ill. Dec. 666, 559 N.E.2d 1006. The appellate court observed that the case before it was one in which " 'no attempt was made to serve the interested party by any means'" (*County Collector*, 202 Ill.App.3d at 413, 147 Ill. Dec. 666, 559 N.E.2d 1006), and that it would be unjust to let the tax deed stand. Accordingly, the appellate court vacated the tax deed order. County Collector, 202 Ill.App.3d at 416-17, 147 Ill. Dec. 666, 559 N.E.2d 1006.

County Collector, and the appellate decisions it relied upon, are not helpful to the public guardian in the case at bar because those cases were decided prior to the passage of the 1990 amendments to section 266 of the Revenue Act. At the time *County Collector* was decided, section 266 stated that relief from tax deed orders could be had under section 2-1401 "in the same manner, upon the same grounds and to the same extent as may be had under that Section with respect to final orders, and judgments in other proceedings." Ill.Rev.Stat.1989, ch. 120, par. 747. The scope of collateral challenges to tax deed orders was thus a matter of judicial decision as to what constituted appropriate grounds for relief under section 2-1401. See, *e.g.*, *County Collector*, 202

Ill.App.3d at 410, 147 Ill.Dec. 666, 559 N.E.2d 1006. After the passage of the 1990 amendments, this was no longer the case. The 1990 amendments added language, currently found in section 22-45 of the Property Tax Code, which states that "[t]he grounds for relief under Section 2-1401 shall be limited to" those enumerated in the statute. 35 ILCS 200/22-45 (West 1994). General, "equitable principles" is not one of the grounds for relief listed in section 22-45.

Further, we note that the result reached by *County Collector*, *i.e.*, that a party with a recorded interest in property who receives no section 22-10 notice whatsoever may seek relief under section 2-1401, has been codified by the General Assembly in section 22-45(4) (35 ILCS 200/22-45(4) (West 1994)). In addition, clerical error has been added as a basis for redemption. See 35 ILCS 200/22-45 (West 1996). However, while the General Assembly has enacted these specific grounds for relief, it has not enacted the broader holding, found in *County Collector*, that general, equitable principles are a basis for relief in all collateral challenges to tax deed orders brought under section 2-1401.

At present, section 22-45 does not contain, as a ground for relief, a general equity provision. See *In re Application of the County Treasurer & ex officio County Collector*, 304 Ill.App.3d 502, 505, 238 Ill.Dec. 109, 710 N.E.2d 906 (1999); In re McKeever, 132 B.R. 996, 1015 (Bankr.N.D.Ill.1991); D. Karlen & R. Slutzky, *A Guide to Tax Deed and Indemnity Fund Proceedings*, in Real Estate Taxation § 11.31, at 11-63 (Ill. Inst. for Cont. Legal Educ.2005). Accordingly, we may not consider the public guardian's argument that the tax deed at issue in this case should be set aside, under section 2-1401, based on equitable principles.

This is not to say, however, that the General Assembly is unconcerned about achieving equity in cases such as this, or

that Mary Lowe's estate has no statutory remedy. As the circuit court below noted, an alternative form of relief is available to Lowe's estate under the indemnity provisions of the Property Tax Code. See 35 ILCS 200/21-295 *et seq.* (West 1994). The indemnity provisions were enacted by the legislature in 1970 in recognition of the fact that taxes may go unpaid, and property may be lost to a tax deed, because of circumstances such as mental or physical disability that are beyond the property owner's control. See G. Turano, *Equitable Relief, Collateral Attack and the Illinois Tax Deed*, 51 Chi-Kent L.Rev. 725, 733 (1974). The provisions create an indemnity fund, from which, pursuant to section 21-305 (35 ILCS 200/21-305 (West 1994)), the former property owner may seek a monetary award for the loss of property. At the time relevant here, section 21-305 provided:

> "(a) Any owner of property sold under any provision of this Code, who without fault or negligence of his or her own sustains loss or damage by reason of the issuance of a tax deed under Sections 22-40 or 21-445 and who is barred or in any way precluded from bringing an action for the recovery of the property or any owner of property containing 4 or less dwelling units who resided thereon the last day of the period of redemption who, in the opinion of the Court which issued the tax deed order, is equitably entitled to just compensation, has the right to indemnity for the loss or damage sustained. Indemnity shall be limited to the fair cash value of the property as of the date that the tax deed was issued, less any mortgages or liens thereon.[4]

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[4] Sections 21-305 has since been amended to make clear that an owner who resides on property with four or fewer dwelling units, and who is seeking an award of $99,000 or less, may recover from the indemnity

* * * The Court shall liberally construe this Section to provide compensation wherever in the discretion of the Court the equities warrant such action." 35 ILCS 200/21-305 (West 1994).

Section 21-305 is well suited to achieve equity in this case. Mary Lowe is deceased. Moreover, although the record does not indicate when any member of Lowe's family last resided in her former home, at a minium, it would have been sometime before Lowe's hospitalization in 1995. Thus, in this case, the importance of the property at issue is not as a place of residence to Mary Lowe or her family, but as the primary asset in Lowe's estate. The indemnity fund can fully compensate Lowe's estate for the monetary value of the property. Further, John Herndon has indicated that, if the tax deed is set aside and the property returned to Lowe's estate, he will pursue an action against the estate to recover the $20,000 worth of improvements he made to the home. Even if such action proves unsuccessful, the estate would bear the cost of defending against the action. Using the indemnity provisions can give the estate the full value of the property without having to withstand the time and expense of any legal action brought by Herndon.

The General Assembly enacted the indemnity provisions to address situations such as that presented in the case at bar. The record indicates that the public guardian has filed a petition for indemnification on behalf of Mary Lowe and that the petition remains pending in the circuit court. After issuing its ruling in this case, the circuit court strongly urged the

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funds by showing equitable entitlement. The owner does not have to show a lack of fault or lack of negligence for the loss. 35 ILCS 200/21-305 (West 2000). See also *Hedrick v. Bathon*, 319 Ill. App. 3d 599 (2001).

public guardian to continue the indemnification action on behalf of Mary Lowe's estate. We do so as well.

Due Process Notice

The public guardian argues that the tax deed issued to Apex should be set aside because Mary Lowe was denied her "due process right to adequate notice" under the United States and Illinois Constitutions (U.S. Const., amend. XIV, § 1; Ill. Const.1970, art. I, §2) prior to the deprivation of her property.

The public guardian's due process argument focuses on the period from August 26, 1995, to December 17, 1996, when Lowe was hospitalized in the Tinley Park Mental Health Center with schizophrenia. It was during this time that Apex filed its petition for a tax deed and that Apex attempted to provide Lowe with the section 22-10 take notice pursuant to the procedures described in sections 22-15 through 22-25 of the Property Tax Code (35 ILCS 200/22- 15 through 22-25 (West 1994)). We note, however, that under the Property Tax Code, a number of notice procedures must take place prior to the delivery and publication of the section 22-10 take notice. For example, before the county collector may offer a property for sale due to delinquent taxes, it must file an application for judgment and order of sale in the circuit court. The county collector must send notice of the application for judgment by certified or registered mail to the party in whose name the property taxes were last assessed not less than 15 days before the date of application for judgment is filed. See 35 ILCS 200/21-135 (West 1994). In addition, the collector must publish notice of its intent to file the application for judgment at least 10 days before the application is filed. See 35 ILCS 200/21-110, 21-115 (West 1994). Pursuant to section 21-175 (35 ILCS 200/21-175 (West 1994)), the county collector must present the application for judgment to the circuit court. At that time, those parties who wish to

contest the application may appear and file objections. *Rosewell v. Chicago Title & Trust Co.*, 99 Ill.2d 407, 414, 76 Ill.Dec. 831, 459 N.E.2d 966 (1984).

Once the circuit court has entered an order of sale, and the tax sale has been completed, additional notice must be provided. Section 22-5 of the Property Tax Code requires the county clerk to send a "take notice" by registered or certified mail to the party in whose name the taxes were last assessed, "within 5 months"[5] after the date of the tax sale. See 35 ILCS 200/22-5 (West 1994). The section 22-5 take notice is similar, though not identical, to the section 22-10 take notice. The section 22-5 take notice must state, *inter alia*, that the property has been sold for delinquent taxes, that a petition for a tax deed will be filed, and that the taxpayer has a right to redeem the property by the date listed.[6] [FN6] However, unlike the section 22-10 take notice, the section 22-5 take notice does not include the time and place the petition for the tax deed order will be heard. See 35 ILCS 200/22- 5, 22-10 (West 1994).

In the case at bar, it is undisputed that Mary Lowe was mentally incapacitated from January 1995 through October 1996. However, the tax sale in this case, and the time periods for the procedures noted above, occurred in 1993. The circuit court made no finding regarding the competency, or

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[5] Section 22-5 has since been amended to state that the notice in that provision must be given "within 4 months and 15 days" of the tax sale. 35 ILCS 200/22-5 (West 2000).

[6] The date listed for the expiration of the redemption period may differ between the section 22-5 take notice and the section 22-10 take notice depending on whether the tax purchaser extends the redemption period and, if so, when that extension is made. See 35 ILCS 200/21-385 (West 1994)

incompetency, of Mary Lowe in 1993. Moreover, while Dr. Rubin testified as to Lowe's incapacity in 1995 and 1996, he did not testify with respect to her condition in 1993. Thus, it appears that, prior to the deprivation of her property, and at a time when there is no finding of record that she was incompetent, Lowe was given notice of the application for judgment and order of tax sale, had an opportunity to object to the application for judgment, was given notice that the tax sale had occurred, and was given notice that she had the right to redeem her property.

The fact that the Property Tax Code contains several notice procedures that must be undertaken before the delivery and publication of the section 22-10 take notice raises an important question. In deciding whether Mary Lowe was denied her due process right to notice prior to the deprivation of her real property, should all of the tax sale and tax deed notice procedures found in the Property Tax Code--including the notice of the application for judgment and order of sale and the section 22-5 take notice--be considered? Or, as the public guardian suggests, should the procedures regarding the section 22-10 take notice be considered by themselves?

In *Rosewell v. Chicago Title & Trust Co.*, 99 Ill.2d 407, 76 Ill.Dec. 831, 459 N.E.2d 966 (1984), this court considered "whether due process requires the county collector to give personal notice of an impending tax sale to all parties with an interest in the real estate." *Rosewell*, 99 Ill.2d at 410, 76 Ill.Dec. 831, 459 N.E.2d 966. In answering this question in the negative, we examined the Property Tax Code as a whole and took note of the notice procedures, other than the notice provided for the tax sale, that are found in the Property Tax Code. We concluded that due process does not require that all interested parties receive personal notice of the tax sale in part because, after the tax sale occurs, the Property Tax Code requires that the interested parties receive notice by mail of

the right to redemption. Only after this notice is sent are the parties' interests in the property finally terminated by the issuance of the tax deed order. *Rosewell*, 99 Ill.2d at 414-16, 76 Ill.Dec. 831, 459 N.E.2d 966. In the case at bar, neither party addresses the analysis employed in *Rosewell* or discusses what effect, if any, compliance with the statutory notice procedures that precede the delivery and publication of the section 22-10 take notice would have on the public guardian's argument that due process was not satisfied in this case. However, we need not attempt to resolve this issue *sua sponte*. For reasons that follow, we conclude that, even if our due process analysis is limited solely to a consideration of the procedures involving the section 22-10 take notice, and to the time period from 1995 to 1996, there is no basis for reversing the judgment of the appellate court.

The standard for determining whether statutory notice procedures meet the requirements of due process is set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See *Rosewell*, 99 Ill.2d at 411-12, 76 Ill.Dec. 831, 459 N.E.2d 966 (applying *Mullane* to a claim brought against the Property Tax Code under the due process clause of the Illinois Constitution). At issue in *Mullane* was whether notice that was published in a newspaper in order to inform the beneficiaries of a common trust of a judicial settlement satisfied due process. Addressing this issue, the Supreme Court stated what has become the widely accepted test for determining the constitutionality of notice procedures:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them

an opportunity to present their objections." *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873.

In adopting the "reasonably calculated" standard, the Court explained that the method used to provide notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it" and that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315, 70 S.Ct. at 657, 94 L.Ed. at 874. The Court also emphasized, however, that "if with due regard for the practicalities and peculiarities of the case" the notice procedure reasonably conveys the necessary information, then "the constitutional requirements are satisfied." *Mullane*, 339 U.S. at 314-15, 70 S.Ct. at 657, 94 L.Ed. at 873. Applying these principles to the issue before it, the Court held that notice by publication was sufficient for those beneficiaries "whose interests or whereabouts could not with due diligence be ascertained." *Mullane*, 339 U.S. at 317, 70 S.Ct. at 659, 94 L.Ed. at 875. However, publication notice was not sufficient for those "known present beneficiaries of known place of residence." *Mullane*, 339 U.S. at 318-20, 70 S.Ct. at 659-60, 94 L.Ed. at 875-76.

In 1983, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), the Supreme Court considered the principles announced in *Mullane* within the context of a tax sale. At issue in *Mennonite* was the constitutionality of an Indiana statute that provided notice to a mortgagee of a pending tax sale only by publication. The Court held the statutory procedure invalid, stating that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party * * * if its name and address are reasonably ascertainable." (Emphasis in original.) *Mennonite*, 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at

188. In so holding, the Court stated that a governmental body charged with providing notice must make "reasonably diligent efforts" to locate the party to whom notice is being provided, but also stressed that the government is not "required to undertake extraordinary efforts to discover the identity and whereabouts of a [party] whose identity is not in the public record." *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4. See also *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1340, 1347, 99 L.Ed.2d 565, 578 (1988) (the executor of an estate must make " 'reasonably diligent efforts' " "to uncover the identities of creditors. For creditors who are not 'reasonably ascertainable,' publication notice can suffice"), quoting *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4.

The notice procedures in the Property Tax Code have been held constitutional under *Mullane* and *Mennonite* by this court and others. See *Rosewell*, 99 Ill.2d 407, 76 Ill.Dec. 831, 459 N.E.2d 966; *Balthazar v. Mari Ltd.*, 301 F.Supp. 103 (N.D.Ill.1969), *aff'd*, 396 U.S. 114, 90 S.Ct. 397, 24 L.Ed.2d 307 (1969); *Catoor v. Blair*, 358 F.Supp. 815 (N.D.Ill.1973), *aff'd*, 414 U.S. 990, 94 S.Ct. 345, 38 L.Ed.2d 231 (1973). The public guardian points out, however, that none of these decisions addressed the due process rights of the mentally ill in the context of tax sale cases. This issue was, however, considered by the United States Supreme Court in *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956).

In *Covey*, the Supreme Court applied the principles of *Mullane* to a municipal tax lien sale where the delinquent taxpayer had no guardian and was known by town officials "to be a person without mental capacity to handle her affairs or to understand the meaning of any notice served upon her." *Covey*, 351 U.S. at 146, 76 S.Ct. at 727, 100 L.Ed. at 1026.

Although the town officials had complied with the notice procedures found in the governing statute, the Court held that, given the taxpayer's mental incapacity, due process had not been afforded. Citing to *Mullane's* "reasonably calculated" standard, the Court stated that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [the requirement of due process]." *Covey*, 351 U.S. at 146, 76 S.Ct. at 727, 100 L.Ed. at 1026. Because the taxpayer "was wholly unable to understand the nature of the proceedings against her property" and because "the town authorities knew her to be an unprotected incompetent," the Court held that due process requirements had not been met. *Covey*, 351 U.S. at 147, 76 S.Ct. at 727, 100 L.Ed. at 1026. See also *In re Application of the County Collector for Judgment & Order Sale Against Lands & Lots Returned Delinquent for Nonpayment of General Taxes for the Year 1982 & Prior Years*, 188 Ill.App.3d 1068, 136 Ill.Dec. 621, 545 N.E.2d 145 (1989) (applying Covey).

Although *Covey* involved a situation where the government had *actual* knowledge of the delinquent taxpayer's mental incapacity, the public guardian argues that the case may also be read as applying to those situations where the party charged with providing notice *should* have known of the taxpayer's incapacity. Applying this reading of *Covey* to the case at bar, the public guardian argues that Mary Lowe's due process rights were violated because Apex should have known of Lowe's mental illness. The public guardian reasons that, if Apex had been more diligent in conducting its search for Mary Lowe, it would have noticed the notations on the envelopes that were returned by the post office and filed by the sheriff in the circuit court. If Apex had noticed the notations, according to the public guardian, it would have known of Lowe's hospitalization, and would have known that the initials and numbers on the envelope

belonged to a postal carrier. With this knowledge, Apex could have contacted the post office and learned that Lowe was in a mental hospital. And, once Apex knew that Lowe was in a mental hospital, it would have known that she was suffering from a mental disability. Thus, according to the public guardian, Apex should have known of Lowe's mental illness and, under *Covey*, due process was not satisfied. [7]

The circuit court below rejected the argument that Covey controlled here. The court held that even if Apex should have known that Lowe was hospitalized, this did not mean that Apex should have known of Lowe's mental illness. As the court explained, there are many reasons for which an individual may be hospitalized that have nothing to do with mental illness. We do not disagree with the circuit court's reasoning. However, we conclude that there is a more fundamental difficulty with the public guardian's argument, namely, the fact that the argument rests on the assertion that Apex did not conduct a diligent inquiry into ascertaining Mary Lowe's whereabouts.

Section 22-15 of the Property Tax Code (35 ILCS 200/22-15 (West 1994)) requires the tax purchaser to make a "diligent inquiry" to locate the property owner and interested parties when attempting to serve the section 22-10 take notice. This "diligent inquiry" is also a constitutional

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[7] The public guardian's argument is directed toward Apex and its purported failure to take adequate steps to notify Mary Lowe. Apex is a private party. Nevertheless, Apex does not dispute that it made "use of state procedures with the overt, significant assistance of state officials" (*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486, 99 L.Ed. 2D 565, 576, 108 S. Ct. 1340, 1345 (1988), so that sufficient state action exists here to invoke the protections of due process. See also F. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 Ind. L. J. 747, 764 n. 102 (2000).

requirement. See *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4 (due process requires that "reasonably diligent efforts" be made to locate the party to whom notice is being served); *Tulsa*, 485 U.S. at 490, 108 S.Ct. at 1347, 99 L.Ed.2d at 578 (same). In this case, when the circuit court entered the tax deed order in May of 1996, it held that Apex had made a diligent inquiry to locate Mary Lowe, thereby satisfying statutory and constitutional requirements.

In arguing that *Covey* controls here, the public guardian is attempting to relitigate the circuit court's diligent inquiry finding. The public guardian's contention is that Apex was not diligent in searching for Mary Lowe, and that if it had been, it would have learned that Lowe was hospitalized and suffering from mental illness. However, the circuit court's diligent-inquiry finding may not be challenged in a section 2-1401 petition, other than for the reasons given in section 22-45 of the Property Tax Code (35 ILCS 200/22-45 (West 1994)). And, as previously discussed, we have concluded that the only ground under section 22-45 that is relevant here, *i.e.*, fraud or deception (see 35 ILCS 200/22-45(3) (West 1994)), has not been proven.

To hold in this case that the public guardian may reopen the circuit court's diligent-inquiry finding would run counter to the principles of finality for tax deed orders that have existed, and been approved by this court, since at least 1958. See Southmoor Bank & Trust Co. v. Willis, 15 Ill.2d 388, 396, 155 N.E.2d 308 (1958) (unless a lack of jurisdiction affirmatively appears on the record, the prior findings of the court of compliance with all the provisions of law entitling the tax purchaser to a tax deed cannot be disputed in a collateral proceeding). We decline to so hold. Accordingly, we do not further consider the public guardian's argument

that the present case falls under Covey because Apex failed to conduct a diligent inquiry to locate Mary Lowe.

The public guardian raises an additional constitutional argument that does not require reexamination of the circuit court's diligent inquiry finding. The public guardian contends that the Property Tax Code is unconstitutional as applied to all individuals, such as Mary Lowe, who are hospitalized with a disabling mental illness during the section 22-10 notice period, regardless of whether the tax purchaser has knowledge of the mental illness. According to the public guardian, the notice procedures for the section 22-10 take notice are unconstitutional because, even if the notice is actually received by the mentally disabled person, it will not be effective, i.e., the person will not be able to understand or act upon it. As the public guardian states, "even if [Mary Lowe] had been served the notice [it] would have been meaningless to her due to her cognitive impairments."

This is not the proper test for assessing the constitutionality of a notice procedure. In determining whether a notice procedure is constitutional, the question is not whether the procedure actually succeeds in notifying the individual but, rather, whether the procedure is reasonably calculated to do so. As the United States Supreme Court has stated, "[The *Mullane* standard] does not say that the State *must provide* actual notice, but that it *must attempt to provide* actual notice." (Emphases in original.) *Dusenbery v. United States*, 534 U.S. 161, 170, 122 S.Ct. 694, 701, 151 L.Ed.2d 597, 606 (2002). See also *Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 284 (6th Cir.2005); *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246 (2d Cir.1995); 16B Am.Jur.2d *Constitutional Law* § 937 (1998) ("If a party employs a procedure reasonably calculated to achieve notice, a successful achievement is not necessary to satisfy due process requirements"). This point--that a notice procedure

need not actually succeed in providing notice to satisfy due process concerns--was noted in *Mullane*:

> "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317, 70 S.Ct. at 658, 94 L.Ed. at 875.

Moreover, contrary to the public guardian's argument, whether the tax purchaser has knowledge of the delinquent taxpayer's mental illness is a factor that cannot be excluded from the due process analysis. *Mullane* holds that "all the circumstances" (*Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873) of a case must be considered in analyzing the reasonableness of any notice procedure. See also *Mennonite*, 462 U.S. at 799, 103 S.Ct. at 2712, 77 L.Ed.2d at 188 (describing *Covey's* holding that the state must make additional efforts to provide notice to a mentally incompetent individual as resting on the fact that the state was "aware of [the] party's" incompetence).

In addition, the Supreme Court has expressly held that the notifying party's knowledge of the location and status of the person to be notified conditions the level of notice that must be provided. See *Mennonite*, 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188 ("[n]otice by mail or other means as certain to ensure actual notice" is required only if the party's whereabouts are "reasonably ascertainable"); *Tulsa*, 485 U.S. at 490-91, 108 S.Ct. at 1347-48, 99 L.Ed.2d at 578-79 (an executor of an estate must provide notice by mail or other means as certain to ensure actual notice to a creditor,

but only if the creditor's "identity as a creditor was known or reasonably ascertainable," otherwise, publication notice can suffice).

In light of the foregoing, we conclude that, in considering the constitutionality of the notice procedures set forth in sections 22-10 through 22-25 of the Property Tax Code as applied to those who are hospitalized for mental illness, the relevant question is not whether those procedures ultimately succeed in providing actual notice. Rather, the relevant question is whether the procedures require the tax purchaser to make "reasonably diligent efforts" (*Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4, 77 L.Ed.2d at 187 n. 4; *Tulsa*, 485 U.S. at 490, 108 S.Ct. at 1347, 99 L.Ed.2d at 578) to locate and identify the hospitalized individual as a mentally disabled person entitled to the protections discussed in *Covey*.

The Property Tax Code does not include procedures that are addressed specifically to those individuals who are hospitalized for mental illness. Nothing in the Property Tax Code, for example, requires tax purchasers to contact mental-health facilities or other hospitals and ask whether the delinquent taxpayer is a patient. Such a procedure would correct the problem that is present in this case. If the hospital told the tax purchaser that the taxpayer was, in fact, a patient and had been admitted with a mental illness, the tax purchaser would be on notice of the taxpayer's incompetence and *Covey* would apply.

However, such a procedure would also be illegal under Illinois law. Section 3(a) of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/3(a) (West 2000)) states: "(a) All records and communications shall be confidential and shall not be disclosed except as provided in this Act." "Communications" include "information which indicates that a person is a

recipient [of mental-health services]." 740 ILCS 110/2 (West 2000)). Any person who knowingly and willfully discloses confidential communications is guilty of a Class A misdemeanor. 740 ILCS 110/16 (West 2000). Nothing in the Mental Health and Developmental Disabilities Confidentiality Act permits hospitals to disclose the fact that an individual is a recipient of mental-health services to tax purchasers.[8]

The public guardian does not suggest that the privacy protections afforded the mentally ill in the Mental Health and Developmental Disabilities Confidentiality Act are unconstitutional or that they can in any way be altered by this court. Nor has the public guardian identified any other procedure, in addition to the diligent inquiry requirement already found in the Property Tax Code, which would enable the tax purchaser to learn that the delinquent taxpayer is hospitalized and suffering from mental illness. Thus, the notice procedures in the Property Tax Code embody all that can be done under existing law to locate and identify a delinquent taxpayer who is hospitalized for mental illness.

The public guardian cites to three decisions from other jurisdictions in support of its argument the Property Tax Code is unconstitutional as applied to those who are hospitalized for mental illness. See *In re Consolidated Return of the Tax Claim Bureau*, 75 Pa.Cmwlth. 108, 461 A.2d 1329 (Pa.Commw.1983); *Blum v. Stone*, 127 A.D.2d 549, 511 N.Y.S.2d 638 (1987); *Vance v. Federal National Mortgage Ass'n*, 988 P.2d 1275 (Okla.1999). The appellate court distinguished these cases on their facts. To the extent that they are not factually distinguishable, and support the public

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[8] In the case at bar, Mary Lowe's medical records were obtained only after the circuit court issued a subpoena.

guardian's position in this case, we conclude that these decisions are not persuasive. The decisions commit the same error that the public guardian does, *i.e.*, they conclude that due process requires actual notification, rather than reasonable notice procedures. Further, none of these cases address the privacy rights of the mentally ill nor do they identify what procedures could be put into place to correct the problem of notifying individuals who are hospitalized with mental illness.

"The most important criterion in the area of procedural due process is 'reasonableness.' "*Rosewell*, 99 Ill.2d at 412, 76 Ill.Dec. 831, 459 N.E.2d 966. Because the notice procedures involving the section 22-10 take notice encompass all that can be done to locate and identify the hospitalized, mentally ill taxpayer, by definition, those procedures are reasonable. Accordingly, we hold that, as applied to those taxpayers who are hospitalized for mental illness, sections 22-10 through 22-25 of the Property Tax Code meet the requirements of due process.

Finally, we note that the circuit court below, in issuing its ruling, discussed the privacy implications of this case in some detail. The court noted that it is the public policy of Illinois to protect the privacy rights of the mentally ill but that such protection can, as in this case, have unintended consequences that actually work against the interests of the mentally ill. The court went on to suggest that, when a patient is hospitalized for mental illness and no family member or guardian is available, the legislature might consider allowing the hospital to notify the county collector, under seal, of the patient's situation, so that any time periods relating to the payment of taxes could be tolled. We express no opinion on the wisdom of this suggestion. However, we join in the circuit court's conclusion that the issues raised in this case merit legislative attention.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court is affirmed.

Affirmed.

Justice KARMEIER took no part in the consideration or decision of this case.

Appendix B

In The Appellate Court Of Illinois First Judicial District

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEARS 1991 AND PRIOR YEARS, (PETITION OF APEX TAX INVESTMENTS, INC., Petitioner-Appellee, and JOHN HERNDON, Subsequent Transferee and Claimed Beneficial-Interest Holder, Appellee, v. MARY LOWE, deceased, by Patrick T. Murphy, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe, Respondent-Appellant).

No. 95 CoTD 3812
Sept. 12, 2003

ORDER

The Cook County Public Guardian, on behalf of Mary Lowe's estate, appeals the trial court's order denying its petition to set aside the tax deed issued to Apex Tax Investments, Inc. ("Apex").[1] On appeal, the Public Guardian contends that Apex did not provide Lowe, a mentally incompetent individual, with adequate notice of the tax deed proceedings. The Public Guardian also contends that Apex knew or should have known that Lowe was mentally

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[1] The tax purchaser's name appears in various forms throughout the record including: Apex Tax Investments, Inc.; Apex Tax Investments, Ltd.; Apex Tax Investment; and Apex Properties. The subsequent transferee is John Herndon. For purposes of brevity, we refer to the parties collectively as "Apex" in this order.

incompetent and was obligated to appoint a guardian to Lowe to effectively provide her with notice. The Public Guardian's final contention on appeal is that Apex's representation that it made a diligent inquiry to determine Lowe's whereabouts constituted fraud pursuant to section 22-45 of the Illinois Property Tax Code. For the reasons to follow, we affirm.

Lowe began experiencing psychiatric problems in the early 1960s. Lowe was hospitalized for approximately 16 months from August 25, 1995 to December 16, 1996, when she was released to the care of her son, Bruce Lowe. Lowe died on November 15, 1998.

In 1977, Lowe purchased the property, a single-family, split-level townhouse. Lowe conveyed the property in 1993 through a quitclaim deed to herself and her companion, William Austin, as joint tenants. Austin died in 1994 and Lowe became the sole owner of the property by rights of survivorship.

On March 3, 1993, Apex purchased the property at a tax sale for $347.61, which was the amount of the 1991 property-tax delinquency and fees. Apex filed a petition for the issuance of a tax deed with the circuit court on October 5, 1995. Lowe's right to redeem the property from the tax sale was to expire on February 21, 1996. On March 6, 1996, Apex filed an application for an order directing the issuance of a tax deed. Along with its application, Apex submitted the affidavit of its authorized agent Fred Berke. Berke, among other assertions, stated that "no person interested in said real estate is believed to be a minor or is known to have been adjudicated incompetent."

On March 18, 1996, a hearing was conducted relating to Apex's application for a tax deed. Apex's attorney, Jonathan

Smith, informed the trial court that the redemption period expired and there was no redemption of the property.

At the hearing, Smith also informed the court regarding the parties that were served, the manner they were served and the date they were served. The Cook County Sheriff personally served the following individuals with notice of the tax-deed proceedings: (1) the Cook County Clerk; (2) Starks & Boyd, P.C., the law firm that prepared the 1993 quitclaim deed to the property; and (3) First National Bank of Chicago, a mortgagee of the property. The sheriff also attempted to serve Austin, Lowe and "occupant" with notice on October 26, 1995. The sheriff filed returns of service relating to these individuals on November 9, 1995. On the returns of service, the process server noted that the "house is vacant per neighbors" and checked the line next to "MOVED" indicating the reason for the failure to serve the notice.

The sheriff also sent notice addressed to Austin, Lowe and "occupant" directly to the property by certified mail, return receipt requested. Each of these notices is postmarked November 8, 1995 and is stamped "returned to sender." The word "deceased" was written on the envelope addressed to Austin. The sheriff filed this returned notice with the court on November 22, 1995. The envelopes containing the notices to Lowe and "occupant" bear a stamp indicating unsuccessful attempts to deliver the notices were made on November 16, December 11 and December 18, 1995. Printed on each envelope was "person is hospitalized." The sheriff filed the returned notices with the court on January 2, 1996.

The Clerk of the Circuit Court of Cook County also sent notices to Austin, Lowe, "occupant," Starks & Boyd, P.C., and First National Bank of Chicago by U.S. mail on November 8, 1995. The U.S. Postal Service returned the

notices addressed to Austin, Lowe and "occupant" to the Circuit Clerk after it made unsuccessful attempts to deliver the notices on November 9, November 15, and November 24, 1995. The Circuit Clerk filed the returned notices addressed to Lowe and "occupant" with the court on November 29, 1995, and returned the notice addressed to Austin on November 30, 1995.

Apex also provided publication notice in *The Chicago Daily Law Bulletin* on October 11, October 12, and October 13, 1995.

Fred Berke, Apex's agent, testified on behalf of Apex at the hearing. Berke testified that he visited the property, received no response after knocking on the door, looked into the living room window and did not see any furniture, and was told by a neighbor that Lowe owned the home but no one currently lived there.

Smith, Apex's counsel, also informed the court at the hearing that Apex was "unable to develop any address for William Austin or Mary Lowe other than the subject property address." Smith stated that Lowe's voter registration card was reviewed in an effort to locate Lowe, city and suburban phone directories were checked and notice was served on Starks & Boyd, P.C. Smith also stated that "all regular efforts proved fruitless" in response to the trial court's inquiry regarding the efforts undertaken by Apex to locate Austin and Lowe. The trial court found that Apex exercised due diligence in identifying the identity of interested parties and the location of parties entitled to notice.

The trial court entered an order on May 20, 1996, directing the County Clerk to issue a deed vesting Apex with title to the property. The County Clerk issued a tax deed on the same day.

On September 5, 1997, Mario and Bruce Lowe, Mary's sons, filed a *pro se* petition asking that their mother be restored to ownership of the property. In the petition, Bruce Lowe alleged that his mother was a resident of the Tinley Park Mental Health Center ("TPMHC") from August 26, 1995 to December 1996. The trial court appointed the Cook County Public Guardian as Lowe's attorney and guardian *ad litem*.

The Public Guardian filed a petition on November 10, 1997, to set aside the tax deed issued to Apex based on section 2-1401 of the Code of Civil Procedure and section 22-45 of the Illinois Property Tax Code. 735 ILCS 5/2-1401 (West 1992); 35 ILCS 200/22-45 (West 1996). On April 17, 1998, the Public Guardian filed an amended petition asking the court to set aside the tax deed issued to Apex on the basis that Lowe did not receive notice of the tax deed proceedings and that Apex's efforts to locate Lowe to serve her with notice failed to comport with due process and the statutory notice provisions. The Public Guardian argued that Apex failed to make a diligent inquiry of Lowe's whereabouts after receiving notice of her hospitalization. The Public Guardian further argued that due to Lowe's mental state, even if Lowe received actual notice, the notice did not satisfy due process requirements.

John Herndon entered into a contract with Apex on December 6, 1996, to purchase the property. Attorney Richard Glickman filed his appearance on behalf of Herndon on August 12, 1998. Herndon also filed a motion to dismiss the Public Guardian's amended petition to set aside the tax deed claiming he is a *bona fide* purchaser of the property as a result of the purchase contract with Apex.

The Public Guardian filed a motion for summary judgment on April 14, 1999, asking the court to find that

Herndon was not a *bona fide* purchaser. The trial court granted the Public Guardian's motion for summary judgment on June 8, 1999. The court found no genuine issue of material fact regarding Herndon being a *bona fide* purchaser because Herndon was aware of Lowe's claim to the property.

On September 17, 1999, the Public Guardian filed a motion for summary judgment on the basis that Apex did not comply with the Illinois Property Tax Code and U.S. Constitutional requirements and requested that the court set aside the tax deed. The court denied the motion. In March 2000, Apex and Herndon filed answers to the amended petition to set aside the tax deed.

On September 6, 2000, in response to the information that Lowe died, the trial court entered an order dismissing with prejudice the amended petition to set aside the tax deed. The probate court entered an order appointing the Public Guardian as administrator to collect for Lowe's Estate. The trial court then granted the Public Guardian's motion to vacate the trial court's September 6, 2000, order and to substitute the Public Guardian, now serving as administrator to collect for Lowe's Estate, as the proper party to prosecute the amended petition.

On February 20, 2002, the trial court held an evidentiary hearing relating to the amended petition to set aside the tax deed. The trial court permitted Herndon to participate in the hearing because he was a subsequent purchaser of the property.

At the evidentiary hearing, the Public Guardian called Dr. Bernard Rubin, a psychiatrist and psychoanalyst, to testify. Rubin, an expert in the field of psychiatry, testified that in his opinion Lowe suffered from a disorganized, chronic schizophrenic disorder, the most severe form of

schizophrenia. Rubin also testified that based primarily on his review of the medical records, he believed that from January 1995 until October 1996, Lowe suffered from a mental illness. Rubin further testified that "my understanding is that she would have no understanding of or could not respond to any legal papers as well as any sort of personal or social issues in her life [between January of 1995 and October of 1996]."

The Public Guardian also called Jewel Hightower, a postal employee, to testify. Hightower testified that she was aware of Lowe's mental condition from her own observations and from observations told to her by neighbors. Hightower also testified that she received letters for delivery addressed to Austin, Lowe and "occupant" that appeared to contain "tax statements" or "tax bills." Hightower stated that she knew Austin died, and therefore wrote "deceased" on the envelope. Hightower further stated that she attempted to deliver the letters addressed to Lowe and "occupant" on three separate occasions. After the last attempt, Hightower indicated that she marked on the letters "person is hospitalized" and returned the letters to the sender. Hightower stated that she knew Lowe was hospitalized at TPMHC but postal regulations prohibited her from indicating Lowe's exact location on the envelope. Hightower also stated that she was not contacted regarding the letters with the notation "person is hospitalized" even though her initials and route number were included on the envelope. Hightower continued that she informed the post office of Lowe's location by writing her hospitalization down on a card kept at the post office. Hightower further stated that she did not receive a forwarding request for Lowe's mail.

Lowe was admitted to TPMHC on August 26, 1995. The trial court at the evidentiary hearing admitted Lowe's mental health records from TPMHC as a Public Guardian exhibit.

Lowe's social worker at TPMHC, Dean Conrad, maintained notes relating to Lowe's medical condition. In a note dated February 2, 1996, Conrad wrote that Lowe continued to express grandiose delusional thinking and that she was "unable to realistically address any subject without interjecting delusional thinking." In Conrad's April 12th note, he wrote that Lowe was "unable to carry on a focused, coherent conversation for a 5 min. period of time."

The trial court denied the amended petition to set aside the tax deed on April 9, 2002. The court held that Apex did not procure its tax deed through fraud or deception since the returned certified letters were not filed with the court until January 2, 1996. The trial court also held that although Apex knew Lowe was hospitalized, Apex was not put on notice that she was hospitalized for psychiatric reasons and therefore, had no reason to believe that Lowe was incompetent. The Public Guardian timely appealed the trial court's judgment on April 18, 2002, and filed an amended notice of appeal on May 8, 2002.

On appeal, the Public Guardian first argues that given Lowe's mental incompetency, Apex did not provide adequate notice of the tax deed proceedings as required by the Illinois Property Tax Code and due process. Individuals cannot be deprived of their property by the government without due process of the law. *Mullane v. Central Hanover Bank & Trust Co., et al*, 339 U.S. 306, 315, 70 S. Ct. 652, 657 (1950). Due process requires providing notice to a party that is reasonably calculated to inform the party of the pendency of the action and provide an opportunity to present objections. *Mullane*, 339 U.S. at 315, 70 S. Ct. at 657. With respect to the notice, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The

reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315, 70 S. Ct. at 657. Due process is evaluated on the basis of reasonableness. *In re Application of County Collector*, 188 Ill.App.3d 1068, 1075, 545 N.E.2d 145, 149 (1989) (*National Indemnity Corp. v. Otsus*),. Reasonableness does not require "burdensome or elaborate efforts to notify interested parties." *Otsus*, 188 Ill.App.3d at 1075, 545 N.E.2d at 149, citing *Rosewell v. Chicago Title and Trust*, 99 Ill.2d 407, 459 N.E.2d 966 (1984).

A trial court's finding of historical facts are reviewed on a manifest weight of the evidence standard and constitutional based claims are reviewed on a *de novo* standard. See *People v. Crane*, 195 Ill.2d 42, 51-52, 743 N.E.2d 555, 562 (2001).

In support of its position that Apex did not provide adequate notice, the Public Guardian relies on *Covey v. Town of Somers*, 351 U.S. 141, 76 S. Ct. 724 (1956) and *In re Application of County Collector*, 188 Ill.App.3d 1068, 545 N.E.2d 145 (1989) (*National Indemnity Corp. v. Otsus*). These cases, however, are distinguishable from the instant case.

Covey was a tax-lien foreclosure case involving a mentally incompetent property owner. *Covey*, 351 U.S. at 144, 76 S. Ct. at 726. The court found that the tax purchaser properly complied with the statutory notification requirements, but knew that the property owner was mentally incompetent when it gave the notice. *Covey*, 351 U.S. at 147, 76 S. Ct. at 727. Holding that the property owner's due process rights were violated, the court stated in part that "Notice to a person known to be incompetent who is without the protection of a guardian does not measure up to th[e] requirement[s of due process]." *Covey*, 351 U.S. at 146, 76

S. Ct. at 727. That case is distinguishable from the present case because the trial court found that Apex did not know that Lowe was mentally incompetent when it provided notice to Lowe. We see no basis in the record to disturb that finding.

Otsus also addressed the sufficiency of notice given to an unprotected mentally incompetent individual in a tax-deed proceeding. *Otsus*, 188 Ill.App.3d at 1077, 545 N.E.2d at 150. Notice of the impending proceedings was given to the property owner Otsus, the Village of Evergreen Park, which is the municipality the property is located in, and PLOWS Council on Aging. *Otsus*, 188 Ill.App.3d at 1070, 545 N.E.2d at 146. In reaching its decision, the *Otsus* court applied the holding of *Covey*. The court held that National had knowledge of Otsus' diminished capacity and that National knew or should have known that the notice given to Otsus would be inadequate to inform Otsus that she could lose her property. *Otsus*, 188 Ill.App.3d at 1077, 545 N.E.2d at 150.

The Public Guardian contends that the *Otsus* court did not find that National knew, or should have known, that Otsus was incompetent but that the notice to Otsus would be inadequate due to her diminished capacity. The Public Guardian further contends that ambiguity existed regarding National's knowledge of Otsus' mental condition and it is uncertain what role that played in the court's decision. The Public Guardian argues that *Otsus* should not be read as holding that notice to an incompetent homeowner is effective provided the party giving the notice is unaware that the homeowner is incompetent.

We interpret *Otsus* differently. We note that the court explicitly stated that "we can reasonably conclude that both National and the Village knew of Mrs. Otsus' diminished

capacity" and that "National knew or should have known that such notice was inadequate to inform Mrs. Otsus that her interest in her property was at risk." *Otsus*, 188 Ill.App.3d at 1077, 545 N.E.2d at 150. *Otsus* holds that a party cannot provide constitutionally adequate, meaningful notice to a party knowing that the party cannot comprehend the given notice.

Unlike the tax purchaser in *Otsus*, there was no indication in the present case that when Apex attempted to provide the notice, it knew that Lowe would not adequately understand the notice. After Apex's repeated attempts to personally serve Lowe proved unsuccessful, Apex provided Lowe with notice by publishing it in the Chicago Daily Law Bulletin. Apex's agent, Fred Berke, also personally visited Lowe's last known address and testified that he was told by a neighbor that no one was currently living in the house. We note that Fred Berke was not told by the neighbor that Lowe was mentally incompetent or was institutionalized. Also, the notation on the envelope by the postal worker did not indicate that the person was hospitalized at a mental health center. Here, the record supports the conclusion that Apex did not know of Lowe's mental incapacity and that Apex provided adequate notice regarding the impending tax deed proceedings.

The Public Guardian also raises three cases in its brief from other jurisdictions to support its position that notice to an unprotected mental incompetent does not satisfy the due process guarantee of our constitution. We do not, however, find these decisions controlling and applicable to the instant case.

The Public Guardian first raises *In re Consolidated Return of the Tax Claim Bureau of the County of Delaware*, 461 A.2d 1329 (Pa. Commw. Ct. 1983) (*Appeal of Glyder*

Realty Corp.). The court in that case invalidated a tax sale holding that notice to a person found to be incompetent at the time statutory notice is given and who cannot comprehend the notice does not satisfy constitutional due process requirements. *Appeal of Glyder Realty Corp.*, 461 A.2d at 1332.

The Public Guardian next raises *Blum v. Stone*, 127 A.D.2d 549 (1987). The court held that the 93 year old property owner whose mental condition was deteriorating was not required to prove that the party providing notice had actual or constructive knowledge of her incompetency. *Blum*, 127 A.D.2d at 553, 511 N.Y.S.2d at 641. The court held that reputation evidence was sufficient evidence concerning the owner's lack of mental capacity and to establish the actual or constructive knowledge of her diminished capacity by members of the community. *Blum*, 127 A.D.2d at 552-53, 511 N.Y.S.2d at 641-42.

The last case the Public Guardian raises is *Vance v. Federal National Mortgage Association*, 988 P.2d 1275 (1999). In *Vance*, the court held that a mortgagor's mental status was a material issue of fact precluding summary judgment. *Vance*, 988 P.2d at 1281. The court in that case stated that the due process analysis regarding the sufficiency of notice required an evaluation of the individual's capacity to understand the service of process of the foreclosure proceedings. *Vance*, 988 P.2d at 1281.

We are not convinced that these cases are controlling and applicable to the case at bar in light of the *Otsus* case decided by this court. The *Otsus* decision does not discuss nor refer to either the *Appeal of Glyder Realty Corp.* or *Blum* case, both of which were decided prior to *Otsus*. *Vance* was decided subsequent to *Otsus*, but *Vance* is distinguishable from the other cases because the court in *Vance* focused

primarily on the propriety of summary judgment when an individual's mental state was a material question of fact. The court in *Otsus*, *Appeal of Glyder Realty Corp.*, and *Blum* broadly addressed the sufficiency of notice given to a mentally incompetent individual. We are persuaded by and find controlling this court's reasoning and decision in *Otsus*. To reiterate, this court in *Otsus* invalidated a tax sale because the tax purchaser knew or should have known that its notice to the property owner was inadequate to inform the owner of the impending loss of her property given her lack of mental compentency. *Otsus*, 188 Ill.App.3d at 1076, 545 N.E.2d at 150. For comparable reasons, we are also not persuaded by the federal social security administration cases cited by the Public Guardian. In the instant case, we conclude that Apex provided adequate notice to Lowe, based upon its many and varied attempts to serve her, and its lack of knowledge of her diminished capacity.

The Public Guardian next argues on appeal that since Apex knew or should have known that Lowe was mentally incompetent, Apex should have sought the appointment of a guardian to ensure Lowe received effective notice of the tax deed proceedings. Due process requires providing notice reasonably calculated to inform interested persons of the proceedings and the opportunity to present objections. *Mullane*, 339 U.S. at 314-15, 70 S. Ct. at 657. If an individual's name and address are reasonably ascertainable, notice by mail or other means that ensures actual notice satisfies due process requirements. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706, 2712 (1983). Mailing notice to an address known not to be the current address is not reasonably calculated to inform interested persons of the impending proceedings. *Robinson v. Hanrahan*, 409 U.S. 38, 40, 93 S. Ct. 30, 32 (1972).

The Public Guardian contends that when Apex's notices were returned undelivered and bearing the notation "person is hospitalized," Apex had a duty to investigate Lowe's hospitalization. The Public Guardian also contends that this investigation would have revealed that Lowe was hospitalized at a mental health center. Therefore, the Public Guardian argues that Apex must be charged with the knowledge that Lowe was hospitalized at a mental health center and this knowledge obligated Apex to seek the appointment of a guardian to adequately represent her interest in the tax deed proceedings. The Public Guardian further contends that Lowe's due process rights should not be violated because the undelivered notices were filed with the court after the end of the statutory notice period due to either the sheriff, circuit clerk or the post office's delay in returning the notices.

We disagree with the Public Guardian's contention that Apex had an obligation to appoint a guardian because Apex was charged with the knowledge of her mental incompetency from the notation "person is hospitalized." We do agree that an individual known to be without the mental capacity to understand the significance of notice should have a guardian appointed to protect the individual's interest. See *Covey*, 352 U.S. at 146, 76 S. Ct. at 727; *Otsus*, 188 Ill.App.3d at 1076, 545 N.E.2d at 150. Where we differ in this situation with the Public Guardian is that the notation "person is hospitalized" imputes Apex with the knowledge that Lowe was without the mental capacity to understand the significance of the notice. Rather, we agree with the trial court that the notation "person is hospitalized" does not necessarily mean the individual is hospitalized at a mental health center. As the trial court indicated, individuals are hospitalized for numerous reasons. Hospitalization at a mental health center would not first come to mind when learning that a "person is hospitalized."

Moreover, given the other attempts undertaken by Apex to locate Lowe, Apex's failure to investigate the notation does not demonstrate the lack of a diligent inquiry nor charge Apex with constructive knowledge of Lowe's mental condition. Since Apex did not know about Lowe's mental incompetency when it attempted to provide notice, Apex did not violate Lowe's due process rights by failing to appoint a guardian to Lowe.

The Public Guardian's final argument on appeal is that the tax deed should be vacated because Apex's representations that it made a diligent inquiry to locate Lowe's whereabouts constitute "fraud or deception" under section 22-45 of the Illinois Property Tax Code. 35 ILCS 200/22-10 (West 1996). As part of the tax deed proceedings, the property purchaser is required to give notice of the tax sale and the date until the property can be redeemed to the property owners, occupants and parties interested in the property. 35 ILCS 200/22-10 (West 1996). The property purchaser must demonstrate a diligent inquiry and effort in locating the owner or interested party. 35 ILCS 200/22-15 (West 1996). Also, the property purchaser must strictly comply with the notice provisions in order to receive a tax deed. 35 ILCS 200/22-40 (West 1996).

Tax deeds are incontestable except by appeal from the court's order directing issuance of the tax deed. 35 ILCS 200/22-45 (West 1996). Relief from the issuance of a tax deed may be sought under section 2-1401 of the Code of Civil Procedure, comparable to the relief sought from final orders and judgment in other proceedings. 35 ILCS 200/22-45 (West 1996). Section 22-45 sets forth the grounds for relief pursuant to section 2-1401, which are as follows:

(1) proof that the taxes were paid prior to sale;

(2) proof that the property was exempt from taxation;

(3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

(4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in Section 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by Sections 22-10 through 22-30. 35 ILCS 2002/22-45 (West 1996).

Obtaining a tax deed by fraud is sufficient grounds for relief from the issuance of the tax deed. Fraud does not necessarily arise from the failure to make a "more thorough inquiry and a more diligent search . . . in the absence of proof of wrongful intent or a pattern of deception." *Zee v. Levy*, 37 Ill.2d 404, 409, 226 N.E.2d 620, 623 (1967). A diligent inquiry does not require a perfect search, but a "kind of search or investigation which a diligent [person], intent on ascertaining a fact, would usually and ordinarily make." *In re Application of County Collector*, 219 Ill.App.3d 396, 404, 579 N.E.2d 936, 941 (1991) (*Keyway Investments, Inc. v. Minority Enterprise Real Estate Investment Trust*). A tax purchaser must provide notice of the tax deed proceedings during the statutory notice period, but may provide the notice any time during the notice period. *In re Application of County Collector*, 220 Ill.App.3d 933, 939, 581 N.E.2d 367 (1991) (*Ohr v. Travelers Mortgage Services, Inc.*). A tax purchaser must diligently attempt to locate and personally serve the property owner before publishing the notice. *Keyway Investments, Inc.*, 219 Ill.App.3d at 403, 579 N.E.2d at 941.

The trial court's determination regarding the exercise of diligence is reviewed on a manifest weight of the evidence standard. *In re Application of Cook County Collector*, 271 Ill.App.3d 12, 15, 648 N.E.2d 153 (1995) (*CNA Tax Investors v. Associates Finance*). Whether conduct amounts to "fraud or deception" is reviewed on a *de novo* standard. *CNA Tax Investors*, 271 Ill.App.3d at 15, 648 N.E.2d at 153.

The Public Guardian contends that Apex did not exercise reasonable diligence because it failed to investigate Lowe's whereabouts based on the information that the "person is hospitalized." The Public Guardian further contends that Apex's representations that it strictly complied with the notice provisions must be considered deceptive. The Public Guardian argues that constructive fraud and equity principles prohibit Apex from benefitting from its failure to exercise reasonable diligence. The Public Guardian also points to Judge Marjan Staniec's affidavit in which Judge Staniec states that he would not have granted the tax deed application had Apex made him aware that Lowe was hospitalized during the notice-serving and redemption periods.

Apex responds that its investigation of Lowe's whereabouts demonstrated reasonable diligence. Apex argues that it acted with diligence because: it attempted to serve Lowe, "occupant" and Austin; Fred Berke, its agent, observed that the house looked vacant; a neighbor told Berke that no one lived in the house; and it attempted to serve Lowe's past attorney. Apex further contends that a tax purchaser is not required to continually update his search for the property's owner throughout the notice period. See *Ohr*, 220 Ill.App.3d at 939, 581 N.E.2d at 371.

The record amply supports the trial court's findings and Apex's contention that Apex made a diligent inquiry into Lowe's whereabouts. Apex reviewed Lowe's voter

registration card to determine her current address. Apex attempted to personally serve Lowe, "occupant" and Austin with notice on multiple occasions. In addition to attempting to serve notice, Apex's agent personally inspected the property and noticed that there was no furniture in the house after looking through a window. The agent then proceeded to determine Lowe's whereabouts by talking with a neighbor who informed the agent that Lowe owned the house but no one was living in the house. Not only did Apex attempt to personally serve Lowe, "occupant" and Austin, but Apex also attempted to serve the attorneys that prepared the 1993 deed to the property and First National Bank of Chicago, the mortgagee of the property. Moreover, a reasonable individual would not have investigated the notation "person is hospitalized" when receiving that notice after the statutory notice period expired nor would it be concluded that the person was hospitalized due to her mental instability.

Additionally, in light of *Ohr v. Travelers Mortgage Services, Inc.*, we agree with Apex that a tax purchaser is required to serve the property owner with notice during the statutory notice period, but is not required to update the search as of the last day of the notice period. Both the Public Guardian and Apex acknowledge that *Ohr* is factually distinguishable from the instant case. In *Ohr*, the mortgage services company argued that it did not receive notice of the tax deed proceedings even though it recorded its interest in the property prior to the end of the statutory notice period. *Ohr*, 581 N.E.2d at 371, 220 Ill.App.3d at 939.

The court in *Ohr* held that a tax purchaser is obligated to provide notice during the statutory period, which can be done on the first, last or any day during the statutory notice period. *Ohr*, 581 N.E.2d at 371, 220 Ill.App.3d at 939. In the instant case, Apex did not learn that Lowe was hospitalized until after the end of the statutory notice period and after Apex

attempted to personally serve Lowe and provide publication notice in the Chicago Daily Law Bulletin. While we agree that *Ohr* did not involve a mentally incompetent property owner but a mortgage lender and Lowe's interest in the property was known at the beginning of the notice period, the court's rule of law in *Ohr* should not be isolated to cases with facts identical to *Ohr*. Based on *Ohr*, we conclude that Apex's failure to investigate the notation "person is hospitalized" does not demonstrate the lack of a diligent inquiry regarding Lowe's whereabouts. Therefore, we further conclude that the trial court's finding that Apex acted with reasonable diligence in determining Lowe's whereabouts was not against the manifest weight of the evidence.

Moreover, the record of in this case does not support the Public Guardian's contention that Apex's representations to the trial court that it exercised diligence in serving notice in compliance with the statutory requirements constituted fraud for purposes of section 22-45. The trial court did not err in finding that Apex exercised reasonable diligence. A diligent inquiry does not require perfection nor is fraud established if an individual could have made a more thorough inquiry. See *Zeve*, 37 Ill.2d at 409, 226 N.E.2d at 623. Proof by clear and convincing evidence that the tax deed was procured by fraud was not established in this case as required by section 22-45 due to Apex's failure to investigate Lowe's hospitalization. Therefore, the trial court did not err in denying the petition to set aside the tax deed.

Accordingly, for all of the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

GALLAGHER, J., with O'MARA FROSSARD, P.J., and SMITH, J., concurring.

Appendix C

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION, ETC.
v.
PETITION OF APEX TAX INV.

No. 95 CoTD 3812

ORDER

This cause coming on to be heard for ruling after trial on petition of Patrick Murphy as Administrator of the Estate of Mary Lowe (D) to set aside tax deed.

For reasons set forth by the court on the record.

It is hereby ordered that the amended petition to set aside tax deed be and hereby is denied.

It is further ordered that this is a final appealable order and there is no just reason to delay enforcement or appeal here from.

Atty No.	23828	ENTERED
Name	R. Glickman	APR 09 2002
Attorney for	Herndon	
Address	111 W. Washington	ENTER: s/_____
City	Chicago IL 60602	JUDGE EDWARD P.
Telephone	312-236-7888	O'BRIEN - 1653

Appendix D

In the Circuit Court of Cook County, Illinois
County Department - County Division
IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEARS 1991 AND PRIOR YEARS,
PETITION OF APEX TAX INVESTMENTS, LTD.

No. 95 CoTD 3812

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 9th day of April, A.D. 2002, at 10:10 a.m.

BEFORE: HONORABLE EDWARD P. O'BRIEN

PRESENT:

OFFICE OF THE PUBLIC GUARDIAN OF COOK COUNTY, ILLINOIS,
(69 West Washington Street, Suite 1800,
Chicago, Illinois 60602,
312-603-0800), by
MS. ATHANASIA LAGOUSAKOS GARGANO,
MR. DANIEL FLISKO and
MS. ELFREDA L. AUSTIN,
Assistant Public Guardians, appeared on behalf of the Estate of Mary Lowe;

BALIN & SMITH, PC,
(100 North LaSalle Street, Suite 1111,
Chicago, Illinois 60602,

312-345-1111), by:
MR. JONATHAN L. SMITH,
appeared on behalf of Apex Tax Investments, Inc.;

LAW OFFICES OF RICHARD D. GLICKMAN,
(111 West Washington Street, Suite 1025,
Chicago, Illinois 60602,
312-236-7888), by:
MR. RICHARD D. GLICKMAN,
appeared on behalf of John Herndon.

REPORTED BY: DINA G. VILLIS, CSR, RPR
CSR No. 84-3400

THE COURT: You can enter appearances from the bench. I'll have a decision for you. Everybody can remain seated if you are more comfortable.

MR. GLICKMAN: For the record, Richard Glickman for John Herndon.

MR. SMITH: John Smith on behalf of Apex Tax Investments.

MS. GARGANO: Nancy Lagousakos Gargano from the Public Guardian's Office on behalf of the administrator of the decedent's estate, Mary Lowe.

MS. AUSTIN: Good morning, Your Honor. Elfreda Austin from the Office of the Public Guardian.

MR. BELKO: Good morning, Judge. Daniel Belko on behalf of the Public Guardian.

THE COURT: All right. I thank you.

Again, this is something that -- I want to thank the parties for their continued patience. We did have a hearing a little over a month ago, and I wanted to review the record one more time.

And again, I want to thank the parties for their patience in this matter, recognizing the fact that this case goes back initially to 1995, and I'm the third judge on it.

So again, your patience throughout this proceeding has been appreciated, and I'm sure I can speak for Judge Staniec and also Judge Arnold as to that fact.

We have here today a motion to vacate a tax order for directed tax deed under Section 2-1401 as modified by 2-245, Subsection 3, of the Property Tax Code.

It's also a contention that the statute, as applied in this instance, resulted in the due process violation as a result of Ms. Mary Lowe's mental incapacity during the period 1995 through 1996.

I'd like to first note -- and again, this is by way of background, but it's an important point. Jurisdiction in this case is in rem, and again, citing the authority of Smith versus DRG, Inc., 63 Illinois 2d, 31. The Court's initial jurisdiction over real estate for back taxes is acquired when the Collector applies to that Court for judgment in order for sale.

And in fact, that was done, and I don't believe anybody seriously questions the nature of the jurisdiction here.

However, by way of background, this isn't an in rem as opposed to an in personam proceeding.

And again, notices are sent and published for purposes of satisfying both the Constitution and -- as well as the U.S. and state Constitutions. And those notices are not sent for covering jurisdiction which is accomplished when, as I said before, the judgment and order for sale is issued.

Also by way of background, the law in this state imposes upon a tax deed purchaser seeking a deed requirement to make diligent inquiry.

And again, going into the background of this case, going back to the prove-up proceeding first filed back in 1996, I reviewed the transcript of proceedings. And again, that diligent inquiry was initiated, according to the transcript, on March 18th, 1996.

And the testimony of Mr. Fred Berke, B-e-r-k-e -- and again, that was an ex parte proceeding, but there's nothing unusual about tax deed proceedings being ex parte.

Quite often, in fact, in a vast majority of cases, they are. Due to the statutory framework and, as I said before, in an in rem proceeding, there's nothing improper about that.

Mr. Berke testified that he went to 13250 South Riverdale, which was Mrs. Lowe's residence, and that he looked into a glass living room window, saw no furniture in the living room, knocked on the door. And he also stated that it appeared to him that no one was living there.

Mr. Berke also testified that he went to a neighbor who was not disclosed by name, but again, at the address of 13248 South Riverdale.

He spoke with the neighbor, and the neighbor -- in terms of a description, he said it was a he. So I'm assuming

it's a male, if that's a correct statement, but anyways, the neighbor told Mr. Berke that there was no one living there. However, he did mention the fact that the owners were the Lowes.

Also in the file is an affidavit, as I mentioned before, from a Lawrence Harmon who is the deputy sheriff who was assigned the task of going out and trying to make -- or, basically give personal notice to Mrs. Lowe regarding the tax deed proceeding that was upcoming and also the fact that a take-notice, informing her of what needed to be done to redeem on the property, was issued as well.

I will mention it now and again later, of course, that given Ms. Lowe's capacity, even if she had received that notice, she wouldn't have been able, in all likelihood, to understand or act upon it.

However, the deputy sheriff's affidavit does indicate that he went out on October 26th of 1995. The affidavit indicates that Ms. Lowe was not served.

In addition, we have on the affidavit, when it came to the boxes, the sheriffs typically -- the reason why she was not served, he checked off the box saying that she had moved.

As we all know, there is a space for additional remarks where the sheriff wrote down, "House vacant per neighbors," which again, I assume that that means that he talked to some neighbor, and some neighbor told him that Mr. Berke was told that no one was living in the house presently.

Additional statutory notices in this case were sent out by the Clerk of the Circuit Court as required, as I said, under the statute by certified mail to Mrs. Lowe.

From looking at the envelopes, attempted services were made on November 9th, 1995; November 15th, 1995. And on November 24th, the envelope was remarked as, "Returned and unclaimed." That envelope returned to the Court file, according to the Clerk's stamp, on November 29th of 1995.

I also have, under the statute, sheriff's attempt at certified mail. One attempt was made to Mrs. Lowe in her name. Another was made to "occupant."

Those notices apparently were attempted to be served by some member of the post office, and again, the attempts list November 16th, December 11th and December 18th of 1995 when, again, on that last date, the envelope was marked, "Returned."

And the envelope returned to the court file, according to the Clerk's stamp, on January 2nd of 1996.

Both these envelopes, however, had written on them, "Person is hospitalized." I will return to these mailings later in the discussion.

Final notices, under the statute, are by publication. These were correctly accomplished pursuant to the statute.

I will note in the file in the case that there was also attempts to locate Ms. Lowe by the attorneys who prepared the tax deed presentation -- again, that was Mr. Smith or somebody under his direction and control who attempted or

in fact was successful in serving attorneys by the name of Starks & Boyd who were served on October 26th, 1995.

Their connection with the file was, apparently they were the attorneys who originally prepared the deed by which the property was conveyed to Mrs. Lowe sometime earlier.

Subsection 3 of 2-245 states that a tax deed may be set aside where there is proof by clear and convincing evidence that the deed was procured by fraud or deception.

Now, in this file -- and again, at the prove-up, we have representations made by counsel that all notices under law were given and also that no incompetents appeared to have an interest in the property.

Looking at all the evidence of record in this case presented at the prove-up as well as all the evidence that is in the file and at hearing, I cannot conclude that the deed was procured by fraud and deception.

Additionally, though, even the authority of the Tax Code has been found unconstitutional by the Supreme Court, and I believe it is one of many of the Roseweld decisions.

It's also clear that the statute, as applied, can result in a due process violation where a person with an interest in the property is mentally incompetent and the tax deed petitioner either knew or reasonably should have know that disability.

The lead case on this case is the County Collector versus Otsus. That's 188 Ill. App. 3d, 1068. That's a 1989 case written by Justice Scariano, which again was interpreting an earlier United States Supreme Court case

dealing with this aspect of the law and the due process context dealing with people who have mental incapacities.

During the hearing last month, we had the testimony of Dr. Rubin who I believe is an eminent psychiatrist and has testified before before me where Dr. Rubin came to the conclusion that Mrs. Lowe suffered from chronic schizophrenia from the period beginning approximately in January of 1995 to well into 1996.

Moreover, Dr. Rubin testified that Mrs. Lowe was a resident at the Tinley Park Mental Hospital from July 1995 through December of '96, at which time she was taken by a son to live with her in California. And as we all know, Mrs. Lowe later passed away in the state of California.

Dr. Rubin's diagnosis, which I believe is certainly a correct one, was accomplished from an after-the-fact review of Mrs. Lowe's medical records.

As all the parties are aware, these records were obtained by Court order and, in fact, they can only be obtained by Court order. These medical records are generally not publicly available.

And, more importantly, psychiatric treatments records are stringently protected under Illinois law from disclosure. That is done, in my mind certainly, for a laudable legislative purpose. And that's so that people can return to their lives without being stigmatized based upon either a past psychiatric illness or even a present or treatable psychiatric illness.

Under the Otsus case, as stated by Justice Scariano, the appropriate standard of proof, as I'm going to assess it, is not like under Section 22, Subsection 3, which is a clear and

convincing standard but, again, evaluates a civil case in a due process context.

And I believe that the appropriate standard of proof that I should use here is one of preponderance of the evidence.

And again, the inquiry, as I've stated before, is with regards to what was known or reasonably should have been known by the petitioner and people affiliated with the petitioner in this case.

Now, as I said before, due to the testimony of Ms. Hightower, we now know that the person who wrote "Person is hospitalized" on the sheriff's certified mail envelope was Ms. Hightower and that she was a regular U.S. mail carrier in that area.

Ms. Hightower testified before this Court as to how she could have been found using the postal system's identification of carriers based on information on the certified mail envelope.

Ms. Hightower also testified that she knew Mrs. Lowe suffered from a mental illness and that she was, at the operative time, at Tinley Park Mental Health Hospital.

However, when it comes to looking at the actual envelope and the notation that Ms. Hightower did make on it, as we all know, she wrote down, "Person is hospitalized."

She didn't write anything more on the envelope at that time quite possibly for the same reason that neighbors told Mr. Berke and also Deputy Harmon that the persons living at 13250 South Riverdale had moved.

And again, this is a conclusion that obviously, if Ms. Hightower knew, based on the erratic behavior of Mrs. Lowe, that -- and she went into some detail that Mrs. Lowe suffered from a mental illness -- I can't avoid the conclusion that certainly neighbors wouldn't have known that fact as well.

However, looking at the language here, again under the applicable standard of proof and again looking at the inquiry, which is what a person either knew or reasonably should have known, I can't come to the conclusion that because a person is held to be aware of a fact that someone else is hospitalized, as was written on the envelope, that that is reason why somebody reviewing that should basically automatically assume that that hospitalization means that it is subject to mental illness.

And the simple fact of the matter is that there are just too many reasons, as we all know, why as person may be in fact hospitalized which don't prevent them from managing their personal affairs. That's a routine fact of life.

And again, before I came to this division, I in fact did mental health cases. In my own view, I think the fact that -- in terms of likelihood, I didn't think I would have concluded that the simple fact that somebody is hospitalized means that, in all likelihood, it's for psychological reasons or that they lack capacity to run their own life. Although, in Mrs. Lowe's case, obviously that was the fact.

So based on -- again, based on the facts presented in this case, I don't believe that the fact that someone may have been hospitalized, according to Ms. Hightower's notation, should lead one to conclude that the reason for that is basically based upon mental illness or anybody reading that should have known or either knew or reasonably should have

known that in fact the reason for the hospitalization was in fact mental incapacity.

As I said before, the parties are aware that there is an indemnity fund in this case that may allow for Mrs. Lowe's estate to recover the value of her home at the time the tax deed was issued.

And as I said before, certainly -- and I'll say it again -- I urge the attorneys in this case to do so on behalf of the estate.

However, in a case like this one, where someone is divested from their home, I don't believe that financial representations -- or, reparations -- excuse me -- adequately compensate the type of asset loss when in fact that asset is a home.

As I mentioned before as well, psychiatric admissions and also related treatment information is zealously protected from public access under the statutes.

And I think that is for a good reason, as I've mentioned before. However, in the -- in this particular case, the protection of that information actually worked to the serious detriment of Mrs. Lowe. I think that's obvious.

Again, Dr. Rubin testified from the records that at many times, Tinley Park personnel thought about actually having a guardian appointed to represent Mrs. Lowe's estate, but unfortunately -- while she was living there, but unfortunately, that didn't happen.

In theory, when she was at Tinley Park, had a guardian been appointed, then arguably taxes could have been paid, and the property could not have been lost.

Too often, though, either a guardian is not appointed or appointed too late to pay taxes before taxes actually became due, and I don't mean this to be critical of the hospitals.

They have a very difficult job in evaluating family situations, basically, if there are family members that are willing to take responsibility for a person's affairs when they are held in a mental health facility and also the entire -- the idea about choosing a guardian.

It seems to me -- I've mentioned this before. Although this would take some legislative initiative, there could be at least a procedure developed in cases like that where somebody feels that there is a situation where either a guardian cannot be immediately appointed or for other reasons where actually formal guardianship is not appropriate, that the legislature could act to allow medical health personnel to basically file a certificate under seal, asking that the County Collector to forego the basic corrector remedies, including selling property for tax certificates.

This would allow, again, the property to be kept off the record until somebody either returns to good mental health or a guardian is appointed who can take control of somebody's affairs.

It seems like a short form procedure that could be accomplished, again, without invading anyone's privacy rights because I mentioned the fact that this would be something under seal and would not set in motion an entire sequence of events which began in this case, again going back to 1995 and is only concluding today.

This is my best thinking on the matter. And again, as I said before, I thank all the parties for their patience that

they've exercised throughout this long and somewhat arduous case.

So again, for the reasons that I've stated here today, I'd ask counsel to draft an order saying that the motion to vacate the order for tax deed will be denied for the reasons stated in the transcript of proceedings.

So, thank you, everyone.

MR. GLICKMAN: Thank you, Your Honor.

MR. BELKO: Judge, we would like to ask just for a stay.

I don't know if Your Honor wanted to hear that orally or a written motion.

THE COURT: For what now?

MR. BELKO: For a stay, Judge.

THE COURT: What is it that you seek to stay?

MR. BELKO: We seek to stay the judgment that was entered issuing the tax deed.

We intend to appeal this case, and we wouldn't want petitioner to convey, you know, deed to the property.

So we'd like to preserve that and proceed that way. I don't know if Your Honor wants a written motion.

THE COURT: I'll tell you what.

At this point -- and again, I don't know what anybody's thinking is. At this point, certainly if anything in the way of a change in possession, actual possession of the

property is being contemplated, a stay would be appropriate, but in terms of -- I would say today, in terms of actually anticipating doing something in terms of a transfer, since this was a public case -- and again, it's noted for the record -- I would think that anybody who would seek to accomplish a transfer, knowing the fact that you're indicating that you wish to appeal, would do so at their peril.

Certainly, I don't think anybody acquiring title subsequent can claim that they are entitled to bona fide purchaser status.

So again, if you want to file a motion for a stay within the next 30 days, certainly with a motion for rehearing, you can do that, but --

MR. BELKO: Okay, Judge.

THE COURT: -- at this point, again, Mr. Glickman, as of today, your client is entitled.

Is your client intending to do anything other than the status quo that would necessitate me hearing an emergency motion for a stay?

MR. GLICKMAN: Nothing that I have knowledge of, Judge.

THE COURT: Okay. In fact, in order to avoid a hearing on that, will you inform your client if in fact they anticipate doing something like that, to please let you know so that they can let counsel know so, again, they can consider whether or not a stay is appropriate or whether or not they should seek a stay?

Will you do that?

MR. GLICKMAN: No.

THE COURT: You will not?

MR. GLICKMAN: No.

THE COURT: All right. Well, then, we'll take a hearing.

MR. GLICKMAN: If he wants to file a motion, that's fine, but I can't tell my client what they can or can't do.

The answer is simply that we're within 30 days of the order. It's not a final order.

THE COURT: That's sufficient.

MS. GARGANO: Judge, I think that Mr. Glickman isn't -- you're not instructing Mr. Glickman to instruct his client to do anything.

Just if his client intends to sell it, that he just notify us.

THE COURT: That's what I'm asking, and Mr. Glickman is saying that he won't do that.

MR. GLICKMAN: I have never represented Mr. Herndon before, Judge. I know that he owns more than one property, Your Honor.

I don't know how I can make such a representation to the Court. If the Court instructs me, I will do anything the Court instructs me to do, but voluntarily, I think it's not permitted. It's beyond the scope of my --

MS. GARGANO: Judge, when can you hear that? Since we have all of the parties here, we can pick a date.

THE COURT: Well, let me ask the parties a different way. I'll take one final stab at it.

Your involvement is essentially over, unless you've got some subsequent client.

Mr. Glickman, do you have a motion for stay under an order for 30 days?

MR. GLICKMAN: Do I want a hearing? There's no motion even pending.

THE COURT: Do you wish a hearing on a motion?

MR. GLICKMAN: If they file something, I'll deal with it when they file it, but I thought motions have to be filed. I don't even know what they're filing and why they're standing here.

MS. GARGANO: We intend to file it, Judge.

THE COURT: Please.

MS. GARGANO: We'd like to just, out of courtesy for everyone's schedule, select a date right now so that we all could be on the same page. That's all.

THE COURT: That's all I'm proposing.

All right. So we'll do -- at this point, again, why don't we get a -- we can set a hearing date on it, but I don't think there's anything you're going to need to file, other than the fact of what you've already requested, basically.

MS. GARGANO: Judge, we'll file it today.

MR. BELKO: We'll file our motion today, Judge.

THE COURT: Okay.

MS. GARGANO: We'll drop off a courtesy copy and send a copy to Mr. Glickman.

If we can have a date sometime in the next two weeks, that would be --

THE COURT: Yeah. And again, like I say, at this point, for anybody subsequently, certainly, who is attempting to acquire title of this property or someone is attempting the lease, I think your statement on the record today in this case -- although I'm not going to issue a stay today and although I might very well at the next date -- should serve as notice to anybody who wishes to have an interest in this property that in fact the matter is being litigated.

And, in all likelihood, your office will file an appeal on this case. For what it's worth, that will be noted. All right.

MR. BETLKO: Thank you, Judge.

THE COURT: Thank you.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

Appendix E

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION
OF THE COUNTY COLLECTOR, ETC.
v.
PETITION OF APEX TAX INV.
PETITIONER

ORDER

No. 95 CoTD 3812

This cause coming on to be heard on motion for summary judgment of Mary Lowe against Apex Tax Investment.

All parties and this Honorable Court being fully advised.

It Is Hereby Ordered that

1) The motion for Summary Judgment of Mary Lowe be and hereby is denied;

2) Apex and Herndon are given 21 days to file answer to amended 2-1401 Petition of Lowe.

3) That this matter is set for status for the purpose of setting trial date on March 23, 2000 at 11:00 A.M.

Atty No.	23828
Name	R. Glickman
Attorney for	Herndon
Address	111 W. Washington - 1125
City	Chicago IL 60602
Telephone	312-236-7888

ENTERED
FEB 16 2000

ENTER: s/_____
JUDGE NANCY
ARNOLD No. 10
0436

Appendix F

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR, ETC. APEX TAX INVESTMENTS, INC., Petitioner,
v.
MARY LOUISE LOWE, Respondent.

No. 95 CoTD 3812

MEMORANDUM DECISION

This matter comes on for a hearing on two motions for summary judgment – one, by Mary Lowe, whose property was subjected to a tax sale for nonpayment of 1991 real estate taxes and – the other motion, by John Herndon, allegedly the "bona fide purchaser for value" of the subject property, who is the contract purchaser from Apex Tax Investments, Inc., for $10,000. payable in two installments, with the final $5,000. to be payable on March 31, 1999. Herndon was to receive the deed to the property after final payment was made to Apex. Herndon's purchase contract is dated December 6, 1996.

BACKGROUND

Mary Lowe lost her property for nonpayment of 1991 real estate taxes to Apex Tax Investments, Inc. Taxes were sold to Apex on March 3, 1993. Property was not redeemed. Tax deed prove-up proceedings were held on March 18, 1996 and tax deed was later issued to Apex Tax Investments Inc.

During the prove-up, witness Fred Burke testified that he inspected the property during the notice serving period, being September 21, 1995 to November 21, 1995, as required by statute. That he found no one was living there and that upon speaking with a next door neighbor, at 13248 S. Riverdale, he was advised that no one was living there and that the owner of the property was Mary Lowe. Personal service of notice of the sale and expiration of redemption period was made on all parties that could be found, pursuant to the Property Tax Code.

The County Clerk was personally served notice on October 25, 1995 and attorneys Starks & Boyd, P.C., were served, since they prepared the deed to Mary Lowe when she purchased the property.

Representation was made to the court, that since property was vacant and whereabouts of title owners Mary Lowe and William Austin could not be located even with diligent search, mail notices were sent by Apex to preparers of the deed for Mary Lowe and William Austin, on assumption the law firm might know the whereabouts of the title owners. And mortgagee First National Bank of Chicago was served notice on October 24, 1995.

All other requirements of the Property Tax Code regarding notices and due diligence was represented as being in full compliance.

This matter was then taken under advisement until the court received proof of payment of subsequent year taxes, transcript of the prove-up proceedings and an appropriate order of the court to enter. On May 13, 1996, petitioner presented the necessary documents and proofs, along with a proposed order for the issuance of a tax deed to Apex Properties.

We note that the sheriff's two attempted mail service of notice on Mary Lowe was unsuccessful; mail envelopes were returned with post office notation that "person is hospitalized."

On September 5, 1997, Mario John Lowe, son of Mary Lowe, filed a pro se petition for "Restoration of Property Ownership". Another son, Bruce Edward Lowe was the author of the petition.

The pro se petition alleges that Mary Lowe was released from Tinley Park Mental Health facility to the care and custody of her son Bruce Edward Lowe, who resides at Moreno Valley, California and that Mary Lowe was hospitalized at Tinley Park since August 26, 1995. That his mother Mary Lowe has been in and out of various mental health facilities for the past 30 years of her life. He alleges that through his brother Mario, in direct and phone contacts from January 5, 1997 through April 30, 1997 they were unable to ascertain status of their mother's property.

On May 15, 1997, Mario and Bruce allegedly were advised by Cook County Tax Assessor's Office, "to pay back delinquent property taxes in the sum of $1,457.00 "to have the property promptly restored to Mary Lowe's ownership." That on May 13, 1997, he received a copy of the court's prior judgment and orders, and that the $1,457 amount had been applied to the owner's tax debt.

Pro se petitioner Bruce Lowe argues that "personal service on a person of incompetent standing violates the individual's due process."

Tax purchaser Apex "knew" or "should have known" that respondent was in the hospital. It had either actual or constructive notice of the circumstances. Actual if it had

exercised due diligence in reviewing the court file before prove-up, or constructive notice if it failed to exercise due diligence. Apex should or would have noted the Post Office notation on the return envelope – and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by Property Tax Code.

The issue is patently obvious, without the necessity of more specific fact allegation, that Apex asserts is required in the pleadings in Illinois – a fact pleading State – that a mental patient who was hospitalized for mental illness, known to many of her neighbors to be mentally ill, that she would be unlikely to understand the legal significance of such notice, even if she were to receive it, which she did not. (Mentally ill persons are no longer adjudicated incompetent in Illinois since about 1970.) As a matter of fact, institutionalized persons who were previously adjudicated "incompetent" when found "subject to involuntary hospitalization", were in 1970's and later declared as restored to competency by the amended act. Persons, who are hospitalized for mental illness, can be voluntarily patients (not requiring adjudication) or involuntary patients (requiring judicial commitment).

According to son, Bruce Lowe's affidavit, Mary Lowe's hospital records indicate that she was hospitalized for mental illness during the following times:

2-7-64/5-11-64...3-11-65/3-17-65...3-18-65/5-10-66...2-25-75/3-6-75...12-26-75/12-30-75...1-5-76/1-30-76...5-16-78/5-25-78...7-7-78/7-16-78...4-7-79/4-26-79...11-7-79/11-17-79...11-13-87/11-18-87...4-17-89/5-10-89...11-22-89/12-8-89...1-2-90/1-5-90...4-17-91/4-18-91...1-4-93/1-5-91...1-4-93/1-5-93...1-4-95/1-9-95...and from 11-95 to 12-17-96.

She had 20 hospitalizations since February 1964 to December 1996. In November of 1995 when Apex sent notice to Lowe she was at Tinley Park Mental Health Facility.

Post Office letter carrier's affidavit indicates he has had contact with Mary Lowe on a daily basis in 1994 and 1995. Retired Post Office employee lives across street from Lowe's children and Mary Lowe.

On or about December 9, 1996, Herndon entered into an executory installment contract with Apex, for the purchase of the subject property for $10,000. He was required to make two installment payments, with a final payment of $5,000 installment on March 31, 1999 to Apex. He was to receive no deed to the property, until he made the final payment and closing took place.

In accordance with *Daniels v. Anderson*, (162 Ill. 2d 47), Herndon is not a bona fide purchaser, since he had actual knowledge of Mary Lowe's interest in the subject property since at least August 1998, which was several months before he would acquire title to the property by terms of the contract of December 19, 1996.

Apex argues that Herndon's notice of Mary Lowe's interest was insufficient to negate Herndon's status as a bona fide purchaser under the theory of equitable conversation, and cites *Shay v. Penrose*, 25 Ill. 2d 447, as authority for the applicability of equitable conversion theory. The constructive or actual knowledge Apex had of Mary Lowe's interest in the subject property, we believe should be imputed to Herndon. We hold that the equitable conversion theory is not applicable and that Herndon at his own risk undertook to purchase and to rehab the property.

We reject that Herndon is a bona fide purchaser-for-value. No genuine issue of fact exists.

Summary judgment is granted to Mary Lowe. Summary judgment is denied Herndon. This court maintains jurisdiction of the subject matter and parties until other issues pending are resolved.

ENTER: JUDGE MARJAN P. STANIEC
s/_____JUN 08 1999
CIRCUIT COURT - 433

Appendix G

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEARS 1991 AND PRIOR YEARS,
PETITION OF APEX TAX INVESTMENTS, LTD.

NO. 95 CoTD 3812

ORDER DIRECTING ISSUANCE OF TAX DEED

This matter coming on to be heard upon the verified Petition and Application of for an order on said Petition that a Tax Deed issue, and upon proofs and exhibits heard and offered in open court; and the court having heard the statements of the witness and the arguments of counsel and having been fully advised in the premises, FINDS:

1. That it has jurisdiction of the subject matter hereof and of all parties hereto.

2. That the tax sale Notices, copies of which are attached to and made a part of the said Application and Affidavit filed herein, were served in the manner and within the time required by Section 263 and 266 of the Revenue Act of 1939, as amended, upon the persons entitled to such notice.

3. That the persons entitled thereto have had due notice of the filing and the time of hearing upon this petition herein.

4. That the real estate hereinafter described has not been redeemed from the sale of March 3, 1993, pursuant to the judgment for sale as provided by Chapter 120 of the Revenue Act, and that the time for such redemption expired on February 21, 1996.

5. That all general taxes and special assessments which have become due and payable subsequent to said sale have been paid and all forfeitures and sales which occurred subsequent thereto have been redeemed.

6. That all material allegations of said petition are true; that Petitioner has fully complied with all of the Statutes and the Constitution of the State of Illinois relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto, and is therefore entitled to a deed of conveyance vesting in Petitioner the title in fee simple to the hereinafter described real estate and every part thereof.

IT IS THEREFORE ORDERED that DAVID D. ORR, County Clerk of said Cook County, do forthwith make, execute and deliver to said Petitioner upon the surrender to said County Clerk of the Certificate of Purchase delivered to the original purchaser, a good and sufficient deed conveying to said petitioner all of the following real estate, to wit:

> Lot 9 (except the Northerly 25.1 feet thereof) in Block 8 in Golden Gate Subdivision being a Subdivision of part of the East 1/2 of the Northwest 1/4 of Section 34, Township 37 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

Permanent Index Number: 25-34-113-034-0000

IT IS FURTHER ORDERED that this Court reserves jurisdiction of this cause for the purpose of issuing any Orders of Possession to place and maintain said Petitioner in possession of said real estate as may be necessary or desirable, and further, this Court expressly finds, pursuant to Supreme Court Rule 304(a), that there is no just reason for delaying the enforcement of this Order or the appeal therefrom.

s/_____
Marjan P. Staniec 0433

.....
JUDGE JUDGE'S NO.

ENTERED MAY 20, 1996

BALIN, SMITH AND ASSOCIATES, LTD.
Attorneys for Petitioner
100 N. LaSalle, Suite 1111
Chicago, IL 60602
(312) 345-1111
Firm No. 30179

Appendix H

In the Circuit Court of Cook County, Illinois
County Department - County Division

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES FOR THE YEAR 1991 AND PRIOR YEARS.
PETITION OF APEX PROPERTIES

Case No. 95 CoTD 3812
Certificate No. 91-0013384

REPORT OF PROCEEDINGS had in the above-entitled matter, before the HONORABLE MARJAN PETER STANIEC, Judge of said Court, on Monday, March 18, 1996, at 11:00 a.m.

APPEARANCES:
MR. JONATHAN L. SMITH,
appeared on behalf of the Petitioner
WITNESS:
MR. FRED BERKE

THE CLERK: 95 CoTD 3812, Apex Tax Investments.

MR. SMITH: Morning, Your Honor. For the record, Jonathan Smith on behalf of the Petitioner.

I have a witness present. Would like to have him sworn.

(Witness sworn)

Your Honor, this petition for tax deed arises out of the 1991 annual tax sale for the property identified by permanent index number 25-34-113-034. The original certificate of purchase number 91-13384 was sold and issued to Apex Tax Investment on March 3, 1993.

I offer into evidence the original certificate of purchase, ask it be admitted into evidence and leave be granted to withdraw the original, substituting a photocopy attached to the petition for tax deed.

THE COURT: The original admitted into evidence, substitution allowed with a photocopy for the court file. Original is being returned to counsel.

The Court notes there's been no assignment to any other party.

MR. SMITH: Right, Your Honor. Your Honor, the redemption date for this sale expired on February 21, 1996. Subsequent to that date, we checked the Cook County Clerk's judgment book and determined that no redemption had been made.

In order to determine interested parties in this matter, we ordered a printout tract search, examined the documents referred to therein, and caused the subject property to be inspected.

FRED BERKE,

called by the Petitioner, having been first duly sworn, was examined and testified as follows:

EXAMINATION

By Mr. Smith:

Q At this time I call Mr. Fred Berke and ask if you've had an occasion could to inspect the subject property?

A Yes, I did.

THE COURT: He was sworn.

A Yes.

MR. SMITH: Q What did you determine the common street address of the property to be?

A 13250 South Riverdale.

Q And what was the property improved with?

A It was sort of a split level connected townhouse made of like brick and frame sided.

Q Single family residential?

A Yes.

Q And were you able to determine anything about the occupancy of the property at that time?

A Yes. I went to the door. I was able to look inside the glass living room window there. And I noticed there was no furniture in there. And knocked on the door and appeared to be no one living there.

And I spoke to the neighbor next door at 13248. And he says that no one was living there, and the owner was--the owner is the Lowes.

MR. SMITH: Your Honor, through Mr. Berke's inspection and our examination of the public records, we were able to make a list of interested parties. That list is contained on the sheriff's rider to the sheriff's take notice.

At this time I call your attention to the affidavit in support of the application wherein the parties served, the manner they were served, and date they were served is set forth. Also indicate for the record the interest those parties have or may have had in the subject property.

Under Personal Service we list David D. Orr, County Clerk, served pursuant to the Property Tax Code which requires service on the County Clerk. That was on October 25, 1995.

Starks & Boyd, P.C. was served October 26, 1995. Your Honor, the reason they were served is that they were the attorneys who prepared the deed that deeded the property from Mary Lowe to Mary Lowe and William Austin together.

We were unable to develop any address for William Austin and Mary Lowe other than the subject property address. And we knew that property to be vacant. So in attempting to be diligent in ascertaining the whereabouts of these people, giving notice to them the taxes were delinquent, we sent the notices to Starks & Boyd, which we assumed to be the attorneys for Mary Lowe, because Mary Lowe and William Austin were the only parties which were a party to that deed.

Showing to the Court a copy of that deed which conveyed the property from Mary Lowe individually to Mary Lowe and William Austin, which shows the deed was prepared by Starks & Boyd, P.C.

THE COURT: Very well. Admitted into evidence and substitution allowed with a photocopy for the court file at the time you provide a transcript.

MR. SMITH: Thank you, Your Honor.

The First National Bank of Chicago was served in their capacity as mortgagee on October 24, 1995.

There was no one served by substitute service.

And the sheriff of Cook County after attempting personal service sent certified mail to the Occupant, 13250 South Riverdale on November 7, 1995.

William Austin, who was one of the co-owners, at 13250 South Riverdale on November 7, 1995.

Mary Lowe, which was one of the owners with William Austin, also at 13250 South Riverdale, on November 7, 1995. The voters registration polling sheet for this property indicates that Mary Lowe is a registered voter at 13250 South Riverdale. She's also one of the owners of the property.

Your Honor, at this time I offer into evidence the sheriff's take notice, the rider to the sheriff's take notice, the green return receipt cards and envelopes generated by the mailings, the clerk's certificate of mailing, the clerk's take notice, and the rider to the clerk's take notice, along with the

sheriff's returns of service, all of which are contained within the court file, and ask those be admitted into evidence.

THE COURT: Admitted into evidence.

MR. SMITH: Your Honor, notice of these proceedings was published in the Chicago Daily Law Bulletin on October 11, 12, and 13, 1995, the same notice appearing on the sheriff's take notice and then list of interested parties along with the words "unknown owners or parties interested in said property".

I offer into evidence the original certificate of publication, and ask it be admitted into evidence and leave be granted to withdraw the original, substituting the photocopy attached to the affidavit.

MR. SMITH: Q Mr. Berke, was there a notice prepared pursuant to former Section 241(A) of the Revenue Act?

A Yes.

Q Was that directed to the County Clerk within five months of the purchase of the certificate?

A Yes.

Q And do we have that available to us this morning?

A No. I don't have that with me.

Q Do you have the original and will you be able to provide that to the Court?

A Yes, I will.

MR. SMITH: Your Honor, we ask leave be granted to provide the Court with the original with the green stamp on it at the time the transcript and proposed order are presented to this Court.

THE COURT: Leave granted.

MR. SMITH: The property is not registered in Torrens.

There are no minors, incompenents, or estates that appear to have an interest in the property.

And we do not have proof of payment of all subsequent years taxes, although the 1992 taxes were paid and posted to the tax sale judgment book. We'll provide that proof along with the other subsequent years at the time the transcript, proposed order, and other documentation are presented to this Court.

THE COURT: Very well. Leave granted. And what are the diligent efforts you made to try to locate the whereabouts of Mary Lowe and William Austin, Sr?

MR. SMITH: We checked all the city and suburban phone directories and were unable to find any listing or address for Mary Lowe or William Austin. All of our regular efforts proved fruitless and that's why we sent the notice to who we assume to be their attorneys, Starks & Boyd.

We also placed a call to Starks & Boyd, and they would not give us an address, and indicated we should send the notice to them.

THE COURT: Very well. All right. The Court will make a finding the period of redemption expired, no redemption has been made. Due diligence has been

exercised by counsel and the Petitioner in ascertaining parties who had either ownership or other interest in the premises. Due diligence in the inquiry as to whereabouts of parties who had rights to be notified pursuant to Section 214(A), 263 and 266 has been complied with.

The matter will be taken under advisement, continued generally until such time as the transcript, proof of payment of subsequent years taxes, and the appropriate order for the Court to enter, and submission of the original copies of the documents referred to in the transcript.

So ordered and continued generally.